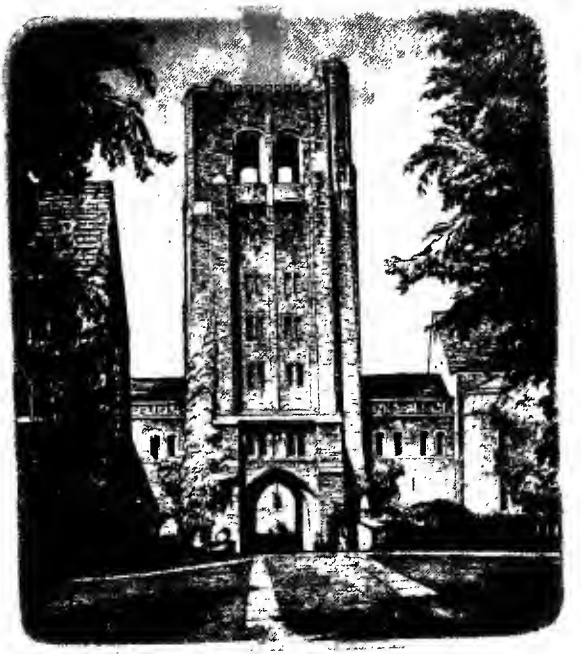

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A TREATISE

ON THE LAW RELATING TO

PRIVATE CORPORATIONS

IN PENNSYLVANIA

BY

FRANK M. EASTMAN

Of the Dauphin County Bar

AUTHOR OF "TAXATION FOR STATE PURPOSES IN PENNSYLVANIA," "TAXATION OF PUBLIC SERVICE CORPORATIONS," ETC.

SECOND EDITION, REVISED AND ENLARGED.

VOLUME I

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PREFACE

THE radical changes effected by legislation in the laws of Pennsylvania relating to corporations since the publication of the first edition of this work, and the numerous decisions in corporation cases rendered since then, have, in the opinion of the publisher, made another edition desirable, and the same is accordingly presented herewith.

The original plan of the work has been adhered to and the law of railroad and canal companies is not treated of herein.

All legislation in Pennsylvania relating to private corporations, enacted since the publication of the first edition, has been inserted, and some thousand additional cases, most of them decided since then, but others inadvertently omitted from the first edition, have been digested and incorporated in the text.

The whole work has been carefully revised, all citations verified and many chapters treating of the more important subjects such as street railway, water, artificial gas, telegraph and telephone companies, etc., have been wholly rewritten. Besides this, numerous chapters have been added treating of subjects of interest.

For the benefit of members of the profession whose corporation practice is limited, much matter of a more or less elementary nature has been inserted, which may not, however, prove wholly without interest to those whose practice of that nature is more extensive.

Numerons acts to which the limited space of the first edition forbade more than a reference are herein presented in full.

Many forms have been added to those originally published, so

that it is believed that the book will be found unusually full in this respect. The index has been elaborated and improved.

Decisions rendered since the book has been printing will be found in the Addenda. These cases are not included in the Table of Cases, but are referred to in the Index.

The writer desires to thank the members of the legal profession for the kind reception accorded by them to the first edition of his work and to express the hope that the present edition may be found worthy of equal favor.

Decisions are cited herein down to page 80 of 220 Pa., page 177 of 35 Pa. Super. Ct., page 368 of 34 Pa. County Court Reports and page 503 of 17 District Reports 246.

F. M. E.

April 1, 1908.

I DEDICATE

THE SECOND EDITION OF THIS WORK

TO MY FRIEND AND ASSOCIATE IN THE PRACTICE OF THE LAW

GEORGE M. HOSACK, ESQ.,

OF THE ALLEGHENY COUNTY BAR,

WHOSE KNOWLEDGE OF ITS SUBJECT MATTER IS EXTENSIVE AND ACCURATE.

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14. Railroad Companies — Co-operative Associations — Iron and Steel Companies.
15. Review of the Foregoing Acts.
16. Act of April 29, 1874.
16a. Classification of Pennsylvania Corporations.

1. Origin of Corporations.

A learned writer in the Harvard Law Review for October, 1888,[1] finds, with much probability, the origin of the modern business corporation, by which will be understood a corporation aggregate, lay, civil, with capital stock, for profit, in the trade guilds of the middle ages. Its genesis is as follows: First, trade guilds controlling within municipal limits the exercise of a given craft. Next, joint-stock companies for the control of the trade to a particular country or region, like the Company of Merchants of London Trading to the East Indies, chartered in 1600, the members of which corporations were not necessarily subscribers

(1) Law of Business Corporations. Harvard Law Review, Vol. 2, p. 108.

to the joint stock, and *vice versa*. In the course of time the right to subscribe to the stock was confined to members of the corporation, and for a long time thereafter purchasers of the stock of the East India Company used to pay a certain sum in addition to the price of their stock, for the privilege of becoming members of the corporation. We find here the reason for the restrictions which have been imposed by law until very recent times upon the voting of stock by shareholders. Originally each member of a corporation had one vote and no more. His right to that vote was wholly independent of the number of shares of stock held by him, inasmuch as he did not necessarily hold any shares at all. The member who had no shares and he who held many had the same voice in the management of the affairs of the company. As the practice changed, and all members became stockholders, the large shareholders attempted to exercise a larger suffrage by what was known as "splitting stock," that is, making temporary transfers of stock to their friends, who thus became entitled to cast one vote each. This led in England to the passage of the Act of 7 Geo. 3, Chap. 48, which recites that "of late years a most unfair and mischievous practice has been introduced of splitting large quantities of stock," etc., and provides that in the future members of corporations who have not held their stock for at least six months shall not be permitted to vote the same. The practice of limiting the number of votes which the holder of shares may cast, which practice was followed by the great majority of acts creating corporations in Pennsylvania down to a very recent period, thus originated.

The joint-stock company was therefore an outgrowth of the guild, and the modern corporation a development of the joint-stock company.

As late as 1692 there were but two or three joint-stock companies of any importance in England, but the Bank of England was chartered in 1694, and thereafter the formation of incorporated companies became comparatively frequent, though it is to be noted that the great majority of companies formed at the time of the South Sea Bubble excitement were unincorporated associations.

2. Early Corporations in Pennsylvania.

Pennsylvania had the honor of incorporating the first business corporation in America, the Philadelphia Contributionship for

Insuring Houses from Loss by Fire, organized in 1752, but not chartered until 1768 (1 Bioren, Ed. 1803, 312). The next business corporation to be incorporated here was the Bank of North America, chartered by Congress in 1781, and by Pennsylvania in 1785, and, the first State charter having been rescinded, again in 1787. The Massachusetts Bank was chartered in 1784, the Proprietors of the Charles River Bridge (Mass.) in 1785, the Mutual Insurance Company of Philadelphia in 1786, and the Associated Manufacturing Iron Company (N. Y.) in 1786. From the last mentioned date forward the formation of business corporations became comparatively frequent, Massachusetts taking the lead in their organization, and at the end of the eighteenth century there were at least fifty corporations in existence, mostly turnpike and bridge companies, in that State alone, and in the remainder of the Union perhaps as many more. The earlier decisions of the courts in Pennsylvania upon the subject of corporation law follow the decisions of the courts of Massachusetts and New York.

3. General Incorporation Act of April 6, 1791.

The history of Pennsylvania corporations may be said to date from 1791, in which year was passed the Act of April 6, 1791, (3 Sm. Laws, 20) providing generally for the incorporation of religious, charitable and literary associations. This was probably the first general incorporation act passed in any of the United States. In the same year was passed the Act of September 29, 1791, (4 Bioren, Ed. 1803, 88) providing for the incorporation of the Schuylkill and Susquehanna Canal Company. The incorporation of the Philadelphia & Lancaster Turnpike Company was authorized by Act of April 9, 1792, (4 Bioren, Ed. 1803, 165) and that of the Bank of Pennsylvania by Act of March 30, 1793, (3 Smith's Laws, 97), and from thenceforward acts authorizing the formation of corporations were passed with gradually increasing frequency.

The year 1791 from which the history of Pennsylvania corporations may be said to date, is remarkable as being the date of the publication of the first work on corporation law, Kyd on Corporations, and the philosopher may note as an interesting coincidence that the same year that saw the awakening of corporate activities in Pennsylvania, saw the repeal of the laws against witchcraft. 3 Sm. Laws, 40, Sec. 4, Act Sept. 23, 1791.

4. Corporation Law in 1791.

It is a familiar fact that the law of business corporations is a modern growth, but the reader, in examining the early statutes and decisions of the courts of this State, and in perusing the work of Kyd, cannot help an involuntary surprise at the condition of corporation law, as it then existed. Whatever corporation law there then was related almost exclusively to municipal, ecclesiastical or eleemosynary corporations. The terms "capital stock," "shares of stock," "dividends," "directors" and many other terms of like importance in modern corporation law are not to be found in Kyd on Corporations. Corporations might not be sued in assumpsit because they could contract only under their corporate seal. On the dissolution of a corporation its creditors had no claim on its property, the real estate going to the original grantor, or failing that, to the crown, and the personalty going, probably, to the crown. A corporation could not be guilty of a tort. The books of a corporation were evidence as between members of the corporation, but not in any matter in which an outsider might be interested. It was evidently doubted whether the officer of a corporation might not be personally liable for his official acts, for we find a decision of the Supreme Court of Pennsylvania, holding him not liable. Down to 1805 the Supreme Court reports of the State do not contain a score of cases involving corporation law.

The first American writer on corporation law was Chancellor Kent, who devotes a chapter or two to that subject in his Commentaries, published in 1826. The first American work devoted wholly to the subject is that of Angell & Ames, published in 1831, of which numerous subsequent editions have been published.

5. Methods of Legislation Relative to the Formation of Corporations in Pennsylvania.

Until a comparatively recent period the great majority of Pennsylvania corporations were formed under the provisions of special acts. These special acts not only provided for the incorporation of the corporations to which they related, respectively, but defined their powers, prescribed regulations for their government and defined their relations with the public. The body of the statute corporation law of Pennsylvania was, therefore, for many years contained in these special acts. When general incor-

poration acts came to be passed, and statutes relating to the government of corporations generally, their provisions consisted largely, indeed almost entirely, of selections from the provisions of prior special acts, which were thus made of general application. The various methods of legislation for the incorporation and regulation of corporations in Pennsylvania have been as follows:

1. Special acts providing for the incorporation of single corporations, and for their organization and regulation.

2. Special acts providing for the incorporation of single corporations, but referring to prior special acts for powers, regulations, etc.

3. General acts providing that when corporations of a given class are incorporated by special acts, they shall be subject to the regulations in such general acts provided.

4. General acts for the incorporation of certain classes of corporations, providing for their regulation, prescribing their powers, etc., such acts not being to the exclusion of special acts for the incorporation of the same classes of companies.

5. General incorporation acts passed since the Constitution of 1874, providing, exclusive of special legislation, for the incorporation, organization and regulation of specified classes of corporations.

6. Resume of General Incorporation Acts—Incorporation by the Supreme Court.

The first general incorporation act to be passed in Pennsylvania was that of April 6, 1791, (3 Sm. Laws, 20)—above referred to—which provided for the incorporation of literary, charitable and religious corporations, by the Supreme Court. A supplement of April 8, 1832, P. L., 238, extended the provisions of said Act to beneficial societies and associations and to fire-engine and hose companies, and, by another supplement of May 7, 1855, Sec. 3, P. L., 477, its provisions were further extended to Odd Fellows', Free Masons', and town and city hall associations. The Act of 1791 and its supplements were probably repealed by the Constitution of 1874 and the Corporation Act of that year.[2]

(2) Com. *v.* Order of Vesta, 2 D. R., 254 (1893); Tara Benev. Soc., 9 Phila., 287 (1874), and see St. Luke's M. E. Church, 17 Phila., 261 (1884); 41 Leg. Int., 74.

An act of March 6, 1820, P. L., 51, authorized the incorporation of societies for the promotion of agriculture and domestic manufactures—fair associations. Another Act, of May 4, 1832, P. L., 470, authorized the Governor to incorporate societies for the cultivation of the white mulberry, for the production of silk.

7. Iron Manufacturing Companies Act of 1836.

The Act of June 16, 1836, P. L., 799, provided for the incorporation of companies to manufacture iron from the raw material with coke or mineral coal, by the Governor. A supplement of April 13, 1838, Sec. 9, P. L., 379, provided that corporators might contribute real and personal estate, instead of money, on account of stock subscriptions, the value of which said property was to be fixed by three disinterested persons to be appointed by the Court of Common Pleas of the proper county. Another supplement of June 29, 1852, P. L., 778, extended the provisions of said act to companies manufacturing iron with charcoal, and still another supplement, that of April 1, 1853, P. L., 269, provided that companies incorporated under the Act of 1836 and its supplement of 1852 might manufacture iron, both with coke or mineral coal and charcoal. Section 2 of the Act of May 3, 1864, P. L., 686, gives corporations so formed the right to manufacture iron or steel, to manufacture articles from these metals, and to carry on the mining, manufacturing, transporting and vending of the products of their business.

8. Formation of Corporations by Courts of Common Pleas.

The Courts of Common Pleas were authorized by Act of October 13, 1840, Sec. 13, P. L., 1841, 5, to incorporate associations for literary, charitable or religious purposes, fire engine or hose companies and beneficial associations or societies. In the formation of such associations and societies, therefore, the Courts of Common Pleas had a concurrent jurisdiction with the Supreme Court. The Act of March 26, 1867, Sec. 1, P. L., 44, expressly gives the said courts authority to grant charters in all cases where the same may be granted by the Supreme Court.

Subsequent acts extended the power of the Courts of Common Pleas to grant charters to the following classes of corporations:

Savings fund, land and building associations of a mutual character in the counties of Philadelphia, Berks and Schuylkill,

(Act of April 22, 1850, P. L., 550) and in all other counties of the State. Act of April 12, 1859, P. L., 544.

Associations for the promotion of science or agriculture, cemetery or burial associations, and societies for the detection of thieves and the recovery of stolen property. Act of Feb. 20, 1854, P. L., 90.

Odd Fellows', Free Masons' and town and city hall associations. Act May 7, 1855, P. L., 477.

Mutual live stock insurance companies, water companies, hook and ladder companies, building associations, musical clubs or associations,[3] teachers' institutes, hotel companies, skating park associations, clubs for the advancement of athletic sports, including base-ball clubs, and barge and fishing clubs; also fire insurance companies, subject to the provisions of the Act of April 2, 1856, P. L., 211. Act of March 26, 1867, P. L., 44.

Savings fund associations, without banking or discounting privileges. Act of April 12, 1867, P. L., 70.

Park associations and associations for the propagation of game and fish. Act of Feb. 18, 1871, P. L., 87. See, also, Act of March 30, 1871, P. L., 239.

Mutual fire insurance companies without capital stock. Act of April 17, 1871, P. L., 240.

Water and gas companies, subject to the general law of 1857; also associations for the protection and preservation of birds, fish and game; market companies and town hall and market companies. Act of February 27, 1872, P. L., 20.

By Act of March 26, 1867, P. L., 44, Sec. 1, corporations formed by the courts are authorized to hold real estate to an amount the clear yearly value or income whereof shall not exceed $20,000.

9. General Incorporation Acts of 1849.

The year 1849 was notable for the passage of several important acts relating to corporations, namely: The Act of February 19, 1849, P. L., 79, providing for the regulation of railroad companies thereafter to be incorporated by special legislation; the Act of January 26, 1849, P. L., 11, regulating turnpike and plank road companies to be specially incorporated, and the Manufacturing Companies Act of April 7, 1849, P. L., 563.

(3) See Act April 26, 1859, P. L. 377.

The last named act provided for the formation of corporations for carrying on the manufacture of woolen, cotton, flax or silk goods, or of iron, paper, lumber or salt. The provisions of this act were extended by numerous supplements to companies to be formed for the purposes mentioned in the note.[4]

10. Joint Tenant Act of 1854.

The Act of April 21, 1854, P. L., 437, provided that any five or more persons, joint owners, tenants in common or joint tenants of mineral lands within the Commonwealth might form a company for the purpose of improving and developing such mineral lands. The provisions of said Act were extended to companies organized for mining carbon oils, and manufacturing, refining and selling or conveying the same to market, by Act of May 1, 1861, P. L., 438. The Act of April 9, 1856, P. L., 283, granted to companies formed under the provisions of the Act of 1854, in addition to the rights conferred by said act, the privilege of mining and preparing for market coal, fire-clay and other minerals found on their lands. A supplement to the Act of 1854, approved February 10, 1865, P. L., 1, authorized the incorporation of corporations for the manufacture of barrels and other wooden vessels.

11. Bridge and Gas and Water Companies Regulation Acts.

The regulation of bridge companies to be thereafter incorporated by special acts was provided for by the Act of April 12, 1855,

(4) The manufacture of glass. Act April 26, 1850, Sec. 4, P. L., 627.

Of articles made from salt, except in Philadelphia. Act April 12, 1851, Sec. 19, P. L., 516.

Printing and publishing. Act April 14, 1851, Sec. 19, P. L., 576, amended by Act of March 27, 1854, Sec. 3, P. L., 215.

Manufacture of enamelled and vitrified iron, and articles made of cast or wrought iron, coated with glass or enamel, within the County of Allegheny. Act April 15, 1852, Sec. 9. P. L., 361.

Of oil and other products of rosin. Act of May 1, 1852, Sec. 9. P. L., 496.

Mining and manufacturing of mineral paints and artificial slates and other articles made by the use of said painting materials except in Philadelphia. Act May 6, 1852, Sec. 7. P. L., 624.

Manufacture of artificial manures, and of articles made out of iron and other metals, or out of wood, iron and other metals. Act April 1, 1853, Sec. 2. P. L., 269.

Mining coal, mining, quarrying and preparing for market lime, marl,

P. L., 219, and the regulation of gas and water companies, similarly formed, was provided for by the Act of March 11, 1857, P. L., 77, improperly entitled an act for the incorporation of such companies.

12. Insurance Companies—Free Banking Acts.

Insurance companies might be incorporated under the provisions of the Act of April 2, 1856, P. L. 211, and building and loan associations under those of the Act of April 12, 1859, P. L., 544. The formation of banks of issue was authorized by the Acts of March 31, 1860, P. L., 459, and May 1, 1861, P. L., 503.

13. Mining, Mechanical, etc. Companies Act of 1863.

The Act of July 18, 1863, P. L., 1864, p. 1102, provided for the incorporation of companies for the purpose of carrying on any mechanical, mining, quarrying or manufacturing business, except that of distilling or manufacturing intoxicating liquors. The provisions of this Act were extended by Act of March 27, 1867, P. L., 47, to companies formed for the purchase and sale of

soda, hydraulic cement, or other minerals, smelting copper, lead, tin or zinc ores, quarrying marble, stone or slate, and manufacturing lumber. Act April 20, 1853, Sec. 1. P. L., 637.

Manufacture of flour in Philadelphia and Beaver counties. Act of May 11, 1853, Sec. 7. P. L., 673.

Common carriers, without the capacity to hold real estate. Act of March 27, 1854, Sec. 4. P. L., 215.

Manufacture of leather in certain counties. Act March 31, 1859, Sec. 1. P. L., 337, and February 8, 1860, Sec. 1. P. L., 39.

Manufacture of oils, hydro-carbon fluids and all other products resulting from subjecting coal of any kind to the action of heat or the process of distillation. Act January 30, 1856, Sec. 1. P. L., 7.

Manufacture of oil from mineral coal in Beaver County. Act April 2, 1859, Sec. 1. P. L., 347.

The mining, manufacturing and refining of carbon oil. Act March 29, 1860, Sec. 1. P. L., 343.

Manufacture of fuel. Act April 3, 1860, Sec. 1. P. L., 629.

Manufacture and preparation of lubricating oil and material, out of and from mineral oils, and other oils or fatty substances, whether mineral, animal or vegetable. Act April 1, 1863. P. L., 191.

Manufacture of leather in the county of Elk. Act March 22, 1865. P. L., 540.

Quarrying, preparing for market and vending marble, sandstone and other stone used for building purposes. Act April 18, 1853, Sec. 11. P. L., 518.

United States patents, and rights under the same; by Act of March 3, 1868, P. L., 45, to companies formed for printing and publishing newspapers, and the doing of job printing in connection therewith; by Act of March 17, 1871, P. L., 292, to companies organized for any horticultural or agricultural business; by the Act of March 12, 1872, P. L., 22, to companies engaged in the transportation and storage of petroleum in certain counties in the Commonwealth (See, also, Act of April 9, 1873, P. L., 66); and by the Act of March 27, 1873, P. L., 49, to companies for building or erecting piers for wharves, bridges, etc., under water, and for other submarine operations.

14. Railroad Companies—Co-operative Associations—Iron and Steel Companies.

The Act of April 4, 1868, P. L., 62, provided for the incorporation of railroad companies; and the incorporation of co-operative associations for carrying on any lawful mechanical, mining, manufacturing or trading business, or for the purpose of trading or dealing in goods or wares, merchandise or chattels within the Commonwealth was authorized by Act of April 14, 1868, P. L., 100.

The incorporation of railroad companies to construct railroads not more than five miles in length was authorized by Act of April 21, 1871, P. L., 247; and the formation of companies for the purpose of making iron or steel, or of manufacturing iron or steel in any shape or form, either of these metals exclusively, or in combination with other metals, or with wood was authorized by the Act of March 21, 1873, P. L., 28. The provisions of the latter Act were extended, by Act of April 18, 1873, P. L., 76, to companies formed for the manufacture of coke with iron and steel, or either of them, and also of glue, sandpaper, hair, kent and woolen goods or paper.

15. Review of the Foregoing Acts.

From the foregoing brief statement of the general incorporation acts passed prior to 1874 it will be seen that there was no method in the formation of corporations in Pennsylvania before that date. Corporations for literary, charitable or religious purposes, fire engine and hose companies, and fraternal or city and town hall associations might be incorporated either by the Supreme Court or the Courts of Common Pleas. The Courts of

Common Pleas might incorporate numerous classes of corporations, some not for profit and others, such as gas and water, fire insurance, market, hotel and hall companies, wholly for profit.

Of the corporations required to be formed otherwise than by the courts, the methods of creation were diverse. The Iron Companies Act of 1836 provided that the incorporators should subscribe articles of association, which should be submitted to the Attorney General for his approval and transmitted to the Governor who should, if he found the objects of the corporation worthy, certify the articles to the Secretary of the Commonwealth, with an order requiring him to enroll the same.

The General Manufacturing Companies Act of April 7, 1849, required the certificates to be first recorded in the office of the recorder of deeds of the county in which the business of the company is to be transacted. A copy, duly certified by the recorder, was to be filed in the office of the Secretary of the Commonwealth, who was required to enter thereon, and on the original certificate required to be returned to the company, the date of filing, and cause the copy to be recorded in his office.

The Mining Act of 1854 followed the requirements of the Act of 1849, but provided that the articles should be first submitted to the Attorney General, and afterwards recorded in the office of the recorder of deeds.

The Manufacturing Act of 1863, the Railroad Company Act of 1868 and the Iron and Steel Companies Act of 1873, each provides a different method for the formation of the corporations to be created under its provisions.

16. Act of April 29, 1874.

The inconvenience resulting from such multiform methods of incorporation was great, and led to the passage of the Act of April 29, 1874, P. L., 73, which provided a uniform system for the formation of such corporations as might then be formed (with the exception of railroad companies and some others). For the disadvantages of the old methods of incorporation, and the objects sought to be attained by the passage of the Act of 1874, see the remarks of Messrs. Wallace and White, Legislative Journal for 1874, pp. 501, 686.

16a. Classification of Pennsylvania Corporations.

Pennsylvania corporations may be divided into three classes, viz.:

1. Corporations formed under special or general acts passed before the adoption of the Constitution of 1874 and the passage of the Corporation Act of April 29, 1874. Railroad companies are included in this class, being formed under the provisions of the Act of April 4, 1868, P. L., 62, and the supplements thereto.[5] As special acts of incorporation are prohibited by the Constitution of 1874, and all general incorporation acts passed prior to that year have either been repealed or superseded, all corporations are now formed, with the exception of railroad companies, either under the Act of April 29, 1874, P. L., 73, or under the provisions of other general incorporation acts passed since the adoption of the Constitution of 1874, as follows:

2. Banks of Discount and Deposit. Act of May 13, 1876, P. L., 171. (Banks of Issue may be formed under the Free Banking Act of May 1, 1861, P. L., 503, whenever the prohibitive federal tax on State bank issues is repealed.)

Insurance Companies. Act of May 1, 1876, P. L., 53, as amended by Act of July 9, 1897, P. L., 239.

Natural Gas Companies. Act of May 29, 1885, P. L., 29.

Traction Companies. Act of March 22, 1887, P. L., 8.

Exposition Companies for educating the public by exhibiting artistic, mechanical, etc., products. Act of June 25, 1887, P. L., 383.

Associations of Employes for Mutual Aid and Benefit and Protection, etc. Act of May 13, 1889, P. L., 194.

Street Passenger Railway Companies. Act of May 14, 1889, P. L., 211, as finally amended by Act of June 7, 1901, P. L., 514.

Savings Banks. Act of May 20, 1889, P. L., 246.

Young Men's Christian Associations. Act of May 9, 1889, P. L., 163.

Beneficial Associations. Act of April 6, 1893, P. L., 10.

Ship Canal Companies. Act of June 24, 1895, P. L., 221.

(5) Railroad companies for the construction and operation of roads not more than five miles long are formed under Act of April 28, 1871, P. L., 246; not exceeding fifteen miles long, under Act of May 21, 1881, P. L., 27.

Colleges and other Institutions of Learning. Act of June 26, 1895, P. L., 327.

Elevated and Underground Railway Companies. Act of June 24, 1895, P. L., 221.

3. Corporations formed under the provisions of the Act of April 29, 1874, P. L., 63, and its numerous supplements.

Besides the foregoing classes of corporations, limited partnership and co-operative associations may be formed under the following provisions:

Limited Partnership Associations. Act of June 2, 1874, P. L., 271; May 9, 1899, P. L., 261. These are in the nature of joint-stock associations.

Co-operative Associations. Act of June 7, 1887, P. L., 365.

Co-operative Banking Associations. Act of May 18, 1893, P. L., 89.

Railroad corporations are not included within the scope of this work. As by far the greatest number of corporations is formed under the provisions of the Act of April 29, 1874, P. L., 73, and its supplements, the general provisions of that act will be first considered, after which the several classes of corporations will be treated of separately. General statements in this work refer principally to corporations formed under the provisions of the Act of April 29, 1874, and its supplements, and while it has been attempted to point out where such statements do not apply to certain classes of corporations, the reader should, in all cases, compare such statements with the chapter treating of the particular class of corporations which he has in mind.

CHAPTER I.

CONSTITUTIONAL PROVISIONS RELATING TO CORPORATIONS.

17. Adopted prior to the Constitution of 1874.
18. The General Assembly shall not pass any special law forming corporations.
19. Nor grant special or exclusive privileges thereto.
20. Nor limit the amount to be recovered for injuries, nor the time within which suits may be brought against Corporations therefor.
21. Nor authorize the investment of Trust Funds in the Bonds or Stocks of Private Corporations.
22. Obligations of Corporations held by the Commonwealth not to be exchanged, transferred or remitted.
23. The Power to Tax Corporations not to be surrendered.
24. The credit of the Commonwealth not to be Loaned to Corporations.
25. Municipalities not to be authorized to Become Stockholders in Corporations.
26. Certain charters to be void.
27. Corporate privileges not to be increased.
28. State's right of Eminent Domain and police power to be supreme.
29. Cumulative voting.
30. Foreign Corporations.
31. Scope of business—Holding of real estate.
32. Stocks and bonds—Increase of stock and indebtedness.
33. Eminent domain.
34. State Banking Laws.
35. Alteration or Revocation of charters.
36. Notice of application for banking privilege.
37. Right to construct telegraph lines, etc.
38. Joint Stock Companies considered as Corporations.
39. Street Passenger Railways not to be constructed save with municipal consent.

17. Adopted prior to the Constitution of 1874.

The Constitution of 1790 contained no provision relative to corporations.

Section 25, of Article 1, of the Constitution of 1838, provided that no corporation with banking or discount powers should be formed without six months' notice of the intended application, that no charter should be granted to such a corporation for a longer period than twenty years, and that charters of such corporations might be altered, revoked or annulled by the Legislature. This provision was inserted as a result of the strong feeling against banks occasioned by the financial panic of 1837, for

which those corporations were generally held responsible. The said section also provided that no law should create, renew or extend the charter of more than one corporation. The provisions of the section now form parts of Sections 10 and 11, Article 16, of the present Constitution.

Section 4, of Article 7, of the Constitution of 1838, provided that the Legislature should not give to any incorporated body the right to take private property for public use without making compensation therefor, and giving adequate security before the property is taken. The provisions thereof are incorporated in Section 8, Article 16, of the Constitution of 1874.

In 1857 the Constitution was amended as follows:

Section 5, Article 11, forbade the pledging of the credit of the Commonwealth to any corporation, and also prohibited the Commonwealth from becoming a stockholder in any corporation or a joint owner of property therewith. This provision is now Section 6, Article 9, of the present Constitution.

Section 6, Article 11, provided that the Commonwealth should not assume the debt of any corporation, except when incurred in suppressing insurrection, etc. This is superseded by Section 4, Article 9, of the existing Constitution.

Section 7, Article 11, provided that the Legislature should not authorize any borough, township or incorporated district to loan its credit to any corporation. This provision is incorporated in Section 7, Article 9, of the Constitution of 1874.

Section 26, Article 1, makes the provision relative to the altering, repealing or annulling of bank charters, in the Constitution of 1838, applicable to the charters of all corporations. This provision is now Section 10, Article 16, of the present Constitution.

An amendment of 1864 provided that no bill should be passed by the Legislature granting powers or privileges in any case where the authority to grant the same was or might be conferred upon the courts of the Commonwealth.

CONSTITUTION OF 1874.[1]

18. The General Assembly Shall Not Pass Any Special Law Forming Corporations.

The General Assembly shall not pass any local or special laws: . . . .

(1) For decisions construing the following constitutional provisions see the notes to such provisions, respectively, in Stewart's Purdon's Digest.

(6). Relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State.

(25). Creating corporations, or amending, renewing or extending the charters thereof. Art. 3, Sec. 7.

19. Nor Grant Special or Exclusive Privileges Thereto.

(26). Granting to any corporation, association or individual any special or exclusive privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track. Art. 3, Sec. 7.

The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever. Art. 3, Sec. 20.

20. Nor Limit the Amount to Be Recovered For Injuries, Nor the Time Within Which Suits May be Brought Against Corporations Therefor.

No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and, in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided. Art. 3, Sec. 21.

21. Nor Authorize the Investment of Trust Funds in the Bonds or Stocks of Private Corporations.

No act of the General Assembly shall authorize the investment of trust funds by executors, administrators, guardians or other trustees, in the bonds or stocks of any private corporation, and such acts now existing are avoided saving investments heretofore made. Art. 3, Sec. 22.

22. Obligations of Corporations Held by the Commonwealth Not to be Exchanged, Transferred or Remitted.

No obligation or liability of any railroad or other corporation, held or owned by the Commonwealth, shall ever be exchanged, transferred, remitted, postponed or in any way diminished by the General Assembly, nor shall such liability or obligation be released, except by payment thereof into the State treasury. Art. 3, Sec. 24.

23. The Power to Tax Corporations Not to be Surrendered.

The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party. Art. 9, Sec. 3.

24. The Credit of the Commonwealth Not to be Loaned to Corporations.

The credit of the Commonwealth shall not be pledged or loaned to any individual, company, corporation or association, nor shall the Commonwealth become a joint owner or stockholder in any company, association or corporation. Art. 9, Sec. 6.

25. Municipalities Not to be Authorized to Become Stockholders in Corporations.

The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual. Art. 9, Sec. 7.

26. Certain Charters to be Void.

All existing charters, or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place, and business been commenced in good faith at the time of the adoption of this Constitution, shall thereafter have no validity.[2] Art. 16, Sec. 1.

27. Corporate Privileges Not to be Increased.

The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the

(2) As to what constitutes a bona-fide organization under this section, see Com. *v.* Continental Trust and Finance Co., 10 D. R., 451 (1901).

same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution. Art. 16, Sec. 2.

28. State's Right of Eminent Domain and Police Power to be Supreme.

The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State. Art. 16, Sec. 3.

29. Cumulative Voting.

In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer. Art. 16, Sec. 4.

30. Foreign Corporations.

No foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same upon whom process may be served. Art. 16, Sec. 5.

31. Scope of Business—Holding of Real Estate.

No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business. Art. 16, Sec. 6.

32. Stock and Bonds—Increase of Stock and Indebtedness.

No corporation shall issue stocks or bonds except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except

in pursuance of general law nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice given in pursuance of law. Art. 16, Sec. 7.

33. Eminent Domain.

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law. Art. 16, Sec. 8.

34. State Banking Laws.

Every banking law shall provide for the registering and countersigning by an officer of the State, of all notes or bills designed for circulation, and that ample security to the full amount thereof shall be deposited with the Auditor General for the redemption of such notes or bills. Art. 16, Sec. 9.

35. Alteration or Revocation of Charters.

The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation. Art. 16, Sec. 10.

36. Notice of Application for Banking Privileges.

No corporate body to possess banking and discounting privileges shall be created or organized in pursuance of any law without three months' previous public notice, at the place of the in-

tended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law, nor shall a charter for such privilege be granted for a longer period than twenty years. Art. 16. Sec. 11.

37. Right to Construct Telegraph Lines, etc.

Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with or hold a controlling interest in, the stock or bonds of any other telegraph company owning a competing line, or acquire by purchase or otherwise any other competing line of telegraph. Art. 16, Sec. 12.

38. Joint Stock Companies Considered as Corporations.

The term "Corporations," as used in this article shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships. Art. 16, Sec. 13.

Article 17, relating to railroad and canal companies, which do not come within the scope of this work, is omitted except Section 9 thereof which relates to street railway companies, and is as follows:

39. Street Passenger Railways Not to be Constructed—Save With Municipal Consent.

No street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities. Art. 17, Sec. 9.

CHAPTER II.

GENERAL AND PRELIMINARY PROVISIONS.

40. Corporations Created under the Provisions of General Laws.
41. Definition of a Corporation.
42. Powers.
43. Corporations are "Persons."
44. Revocation or Alteration of Charters.
45. Collateral Attacks on Charters—De Facto Corporations.
46. Attacks on Special Franchises.
47. Quasi Public and Private Corporations.
48. Purely Private Corporations.

40. Corporations Created Under the Provisions of General Laws.

Since the adoption of the Constitution of 1874, all corporations in Pennsylvania, except such as are formed for the erection of bridges crossing streams which form boundaries between this and any other State,[1] have been created under the provisions of general laws, the General Assembly being prohibited by the Constitution from passing any special or local law creating corporations, or amending, renewing or extending the charters thereof,[2] or from granting special or exclusive privileges or immunity to any corporation or association.[3]

There is no such thing as a common law corporation in Pennsylvania.[4]

41. Definition of a Corporation.

Definitions of corporations have been given in Pennsylvania in Wolf *v.* Goddard, 9 Watts, 544 (1840); Murphy *v.* Farmers' Bank of Schuylkill, 20 Pa., 415 (1853); Gibbs' Estate, 157 Pa.. 59 (1893), and Commonwealth *v.* Fall Brook Coal Company, 156 Pa., 488 (1893). In the last named case a corporation is defined as—

"An artificial person created by law for the purpose of becoming the

(1) Art. 1, Sec. 7, Clause 6, Constitution of Pennsylvania.
(2) Art. 3, Sec. 7, Clause 25, Constitution of Pennsylvania.
(3) Art. 3, Sec. 7, Clause 26, Constitution of Pennsylvania.
(4) Merchants' Bank of Easton *v.* Shouse, 14 W. N. C. 133 (1883).

business representative, agent or trustee of so many persons as may join to furnish the money with which the business to be done by the corporation may be carried on. The corporation comes into existence, like a natural person, naked. The money furnished by those whose representatives it is to be is its capital stock. The amount that each person contributes to this fund is his share in the venture, and is called his share or shares in the stock. The legal title to the whole sum so contributed is in the corporation, and so is the legal title to all the property real or personal in which it may be invested. The equitable title—that is, the right to the profits from the business done, and to a return of the capital when the corporation is dissolved—is in the stockholders."

The Supreme Court of the United States defines a corporation, more simply, as "an association of individuals acting as a single person, and by their corporation name;" also as an association "of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association." [5]

"A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person." [6] Nor does the ownership of the entire capital stock of a bridge company by a city vest the title to the bridge structure in the city.[7]

42. Powers.

The general powers conferred upon corporations in Pennsylvania are almost exactly those which are stated by Blackstone to be necessarily and insuperably incident to every corporation, viz.: To have perpetual succession under the corporate name; to sue and be sued, plead and be impleaded, grant or receive, by such corporate name; to purchase lands and hold them for the benefit of their successors; to have a common seal, and to make by-laws.[8]

(5) U. S. *v.* Trinidad Coal Co., 137 U. S. 160 (1890). For an elaborate analysis of a corporation see Taylor's Private Corp'ns, Chap. 3.

(6) Cook on Corp'ns, Sec. 6, cited with approval in Rhawn *v.* Edge Hill Furnace Co., 201 Pa. 637 (1901); Com. *v.* Monongahela Bridge Co., 216 Pa., 108 (1906) and cases cited.

(7) Com. ex rel. *v.* Monongahela Bridge Co., 8 Dau. Co. Rep. 91 (1905).

(8) 1 Black. Com., 475-6. See Act April 29, 1874, Sec. 1, P. L. 73; Act May 14, 1889, Sec. 1, P. L., 211; Act March 22, 1887; Sec. 1, P. L., 9. See case of Medical College of Philadelphia; 3 Whart. 455 (1838).

43. Corporations are "Persons."

Corporations are usually included within the meaning of the words "person" or "persons" when the same are used in statutes,[9] but not in revenue acts unless such intent is clearly indicated.[10] They are also included within the meaning of the word "individuals."[11] Unincorporated associations are not "persons" within the meaning of the Act of 1874 authorizing five persons to form a corporation,[12] and it is probable that a corporation is not a person in such sense.

44. Revocation or Alteration of Charters.

The charter of a corporation constituting a contract between the State and the corporation, which may not, under the Federal Constitution be impaired,[13] and there being, except in the case of banking associations, no law or constitutional provision in Pennsylvania prior to 1857 permitting the alteration or revocation of charters, all corporate powers granted before that year, except those conferred upon banks, were irrevocable and unalterable, unless the acts conferring them provided for their alteration or revocation.[14] In 1837 the Constitution was amended so as to provide that the charters issued to banks—which corporations were then, practically, the only ones of importance—might be altered, revoked or annulled by the Legislature whenever the same were found to be injurious to the citizens of the Commonwealth. This provision was extended by a constitutional amendment of 1857 to all classes of corporations, and the said amendment, with some verbal alterations, now forms part of Article 16, Section 10, of the present Constitution, as follows:

The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this

(9) Bushel et al. *v.* Com. Ins. Co., 15 S. & R., 173 (1827); Gulf Brewing Co.'s License, 11 Pa. C. C., 346 (1892).

(10) School Directors *v.* Carlisle Bank, 8 Watts, 289-91 (1839); Fox's Ap., 112 Pa., 337 (1886).

(11) Penna. R. R. Co. *v.* Canal Comrs., 21 Pa. 9 (1852).

(12) Hall Assn. of Wash. Camp, 10 D. R., 621 (1901).

(13) Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 708; Brown *v.* Hummel, 6 Pa., 86 (1847); Monongahela Nav. Co. *v.* Coon, *Idem*, 379; Bank of Pa. *v.* Com., 19 Pa., 144 (1852); Com. *v.* Pa. Canal Co., 66 Pa., 41 (1870); Com. *v.* Erie & W. Transp. Co., 107 Pa. 112 (1884); Penna. College Cases, 13 Wall. (U. S.) 190 (1871); Clincleclamouche Lumber & Boom Co. *v.* Com., 100 Pa., 438 (1882).

(14) Hartman *v.* Bechtel, 1 Woodw., 32 (1861); Allen *v.* Buchanan, 9

Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth, in such manner, however, that no injustice shall be done to the corporators. . . .

The Legislature is, by this section, authorized to revoke charters when "in their opinion" the same are injurious to the citizens of the State, which would seem to make that body the sole judge of whether a given charter is injurious or not, and that body is the final judge of what is injurious and when.[15]

The Constitution of 1874 also provided—Art. 16, Sec. 1—that:

All existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place and business been commenced in good faith at the time of the adoption of this Constitution, shall thereafter have no validity.

Where charters were granted subsequently to 1857 and organization was not effected and business begun as required by the above section, they became void under the terms thereof,[16] the power of the constitutional convention to revoke or annul a charter being the same as that of the General Assembly.[17] A charter granted prior to the adoption of the constitutional amendment of 1857, and containing no provision for its own revocation, however, could not probably be forfeited under the above section, but such charter might be revoked for non-user, irrespective of the same. "A charter under which no corporate action has ever been taken, after a reasonable time has elapsed can be avoided by the State at common law."[18] "It may be affirmed as a general principle that where there has been a misuser or a non-user in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture."[19]

Phila., 283 (1873); 30 Leg. Int., 76; Erie City *v.* Erie Canal Co., 59 Pa., 174 (1869); Com. *v.* Penna. Canal Co., 66 Pa., 41 (1870).

(15) Wagner Free Inst. *v.* Phila., 132 Pa. 612 (1890), distinguishing Com. *v.* Pgh. & C. R. R. Co., 58 Pa., 26 and Hays *v.* Com., 82 Pa., 518, and Williamsport Pass. Ry. Co. *v.* Williamsport, 120 Pa., 1 (1888). See Erie & N. E. R. R. Co. *v.* Casey, 26 Pa., 287 (1856).

(16) Clincleclamouche Lumber, etc. Co. *v.* Com., 100 Pa., 438 (1882).

(17) Penna. R. R. Co. *v.* Duncan, 111 Pa. 352 (1886).

(18) Clincleclamouche Lumber, etc. Co. *v.* Com., 100 Pa., 438 (1882).

(19) Com. *v.* Commercial Bank, 28 Pa., 383 (1857); citing Mumma *v.* Potomac Co., 8 Peters (U. S.) 287. See Erie & N. E. R. R. Co. *v.* Casey, 26 Pa., 287 (1856).

45. Collateral Attacks on Charters—De Facto Corporations.

The principle that the charter of a corporation may not be attacked in a collateral proceeding has been laid down in a large number of cases, but the application of the principle has not been clear in many of them. Some would seem to be properly ruled by the principle of estoppel to deny corporate existence by those who have done business with a corporation in its corporate capacity. In many of the cases the rule is stated without limitation to corporations having at least a *de facto* existence, though in such cases the corporations involved all seem to have had such existence, and in other cases the rule is laid down without distinction as applicable not only to the questioning of the corporate existence of a corporation, but to the inquiring into the exercise by it of special powers, its corporate existence being admitted. The decisions have been to the following effect:

A charter may not be impeached in a collateral proceeding because of false statements in the certificate of incorporation,[20] or the omission from such certificate of essential statements,[21] because the act under which the corporation in question was formed was unconstitutional[22] or because the requirements of the act under which the charter was granted were not complied with.[23]

An alleged forfeiture of a charter may not be set up collaterally for an alleged violation of the provisions of such charter or for

(20) Centre & K. Tpk. Co. *v.* McConaby, 16 S. & R., 140 (1827); Hartman *v.* Penna. Range Boiler Co., 24 Pa. C. C., 324 (1900); Garrett *v.* Dillsburg etc., R. R. Co., 78 Pa., 465 (1875).

(21) Cochran *v.* Arnold, 58 Pa., 399 (1868); over-ruling Paterson *v.* Arnold, 45 Pa., 410 (1863).

(22) Freeland *v.* Penna. Central Ins. Co., 94 Pa., 504 (1880); Weinman *v.* Wilkinsburg & E. L. Pass. Ry. Co., 118 Pa., 192 (1887). But see Marshall & Clarke's Private Corporations, Sec. 82 C. (2) p. 246. The two cases cited seem to involve the principle relating to estoppel of persons dealing with a corporation in its corporate capacity to deny its incorporation, rather than the principle forbidding collateral attacks on charters generally. If the act under which a corporation is formed is unconstitutional, then the company is not a *de facto* corporation, because the first essential to the existence of such a corporation is, a law under which a valid incorporation might be effected.

(23) Garrett *v.* Dillsburg etc. R. R., 78 Pa., 465 (1875); Johnston *v.* Eliz. etc. B. & L. Assn., 104 Pa., 394 (1883).

laches in proceeding thereunder [24] or apparently for any reason whatsoever.[25] In short the existence of a *de facto* corporation may not be inquired into collaterally under any circumstances, but a corporation may, apparently, be compelled in a collateral proceeding to show that it is a corporation *de facto,* and the proper method of raising its *de facto* status, where the company is plaintiff, is by pleading the general issue, with notice.[26]

Where, however, the franchises of one corporation are alleged by another corporation claiming to have rights in the premises to have reverted to the Commonwealth, a court will determine whether, under its organic law and the existing facts, the one corporation has lost its right to occupy the disputed territory in opposition to the charter rights of the other company.[27]

If there be no charter, that fact must be pleaded in bar.[28]

The essential features of a *de facto* corporation are: "A law or charter under which an organization *de jure* might be effected; an attempt to organize which falls so far short of the requirements of the law or charter as to be ineffectual; an assumption and exercise of corporate powers notwithstanding the

(24) Hanover Junction etc. R. R. Co. *v.* Haldeman, 82 Pa. 36-46 (1876); Lehigh Bridge Co. *v.* Lehigh Coal & Nav. Co., 4 Rawle, 29 (1833); Turnpike Co. *v.* Jenkintown Elec. Ry. Co., 4 D. R., 8 (1894); Lejee *v.* Continental Pass. Ry. Co., 10 Phila. 362 (1875); Lebanon Water Co., 9 Pa. C. C., 589 (1891) Western Penna. R. R. Co.'s Appeal, 104 Pa. 399 (1884).

(25) Irvine *v.* Lumbermen's Bank, 2 W. & S., 190 (1841); Dyer & Co. *v.* Walker & Howard, 40 Pa., 157 (1861); Gas & Water Co. of Downingtown *v.* Boro. of Downingtown, 193 Pa., 255 (1899); Hinchman *v.* Phila. & W. Chester Tpk. Co., 160 Pa., 150 (1894); Monongahela Bridge Co. *v.* Pitts. & Birm. Traction Co., 196 Pa. 25 (1900); Olyphant Sewerage Drainage Co. *v.* Boro. of Olyphant, 196 Pa. 553 (1900).

(26) Susq. Mut. Fire Ins. Co. *v.* Reinoehl, 4 Pa. C. C., 161 (1887). Prior to the passage of the Practice Act of May 25, 1887, P. L., 272, the plea was in bar. Freeland *v.* Penna. Central Ins. Co., 94 Pa. 504 (1880). Since the passage of said act there is no plea of nul tiel corporation in Pennsylvania. See, however, Union Type Foundry Co. *v.* Kittanning Ins. Co., 138 Pa. 137 (1890).

(27) Chester County Gas Co. *v.* Merion & Radnor Gas & Elec. Co., 16 D. R., 214 (1906); Homestead St. Ry. Co. *v.* Pitts. & H. Elec. St. Ry. Co., 166 Pa., 162 (1895). A bill in equity to enjoin a street railway company from laying its tracks upon certain streets is, in effect, a *quo warranto* and may not be sustained by a private relator. Thirteenth and Fifteenth Sts. Pass. Ry. Co. v. Broad St. Rapid Transit St. Ry. Co., 219 Pa., 10 (1907).

(28) Freeland *v.* Pa. Central Ins. Co., 94 Pa., 504 (1880); Rheem *v.* Wheel Co., 33 Pa. 358 (1859).

failure to comply with the law or charter." [29] Apparently the attempt to organize should be a bona-fide one.[30]

Where a person or corporation has done business with an alleged corporation in its corporate capacity, such person or corporation will be estopped from requiring the corporation dealt with to prove, probably, even a *de facto* existence,[31] and, conversely, a corporation or a stockholder therein will not be permitted to set up a defect of the incorporation against creditors who have contracted with the company on the faith of its lawful corporate existence.[32]

In every suit or judicial proceeding, in this Commonwealth, to which a corporation is a party, the existence of such incorporation shall be taken to be admitted, unless it is put in issue by the pleadings.[33]

46. Attacks on Special Franchises.

The foregoing relates only to cases where the corporate existence of a corporation is sought to be questioned collaterally. Where not the corporate existence, but the possession of special powers which are sought to be exercised, is challenged, the rule is different.

Section 1 of the Act of June 19, 1871, P. L., 1360, provides:

That in all proceedings in courts of law or equity in this Commonwealth, in which it is alleged that the private rights of indviduals or the rights or franchises of other corporations are injured or invaded by any corporation claiming to have a right or franchise to do the act from which such injury results, it shall be the duty of the court in which such proceedings are had, to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury to private rights, or to the rights and franchises of other corporations results and if such rights or franchises have not been conferred upon such corporation, such courts, if exercising equitable powers, shall, by injunction at suit of the private parties or other corporations, restrain such injurious acts; and if the proceedings be at law, for damages, it shall be lawful therein to recover damages for such injury as in other cases.

(29) Gibbs' Estate, 157 Pa., 59 (1893).

(30) Clark & Marshall's Private Corporations, Vol. 1, Sec. 82 (d). p. 249.

(31) Spahr *v.* Farmers' Bank, 94 Pa., 429 (1880); Johnston *v.* Elizabeth B. & L. Assn., 104 Pa., 394 (1883); Smucker *v.* Duncan et al., 10 Pa. C. C. 431 (1891).

(32) Hamilton *v.* Clarion, M. & P. R. R. Co., 144 Pa., 34 (1891).

(33) Act June 24, 1885, P. L., 149. See Sec. 516.

"An inquiry as to whether certain powers are or are not granted by a charter, is not open to the objection that the validity of a charter cannot be assailed in a collateral proceeding. Such inquiries are expressly authorized by the Act of June 19, 1871." [34]

"While the Act of June 19, 1871, P. L., 1360, was not intended to permit an inquiry at the instance of a private suitor as to the validity of a charter or as to its forfeiture, it 'was intended to enlarge and make clear the rights of individuals to inquire into the charter franchises of corporations when asserted to their individual injury': Windsor Glass Co. *v.* Carnegie Co., 204 Pa., 459." [35]

Whether a right or franchise claimed by a corporation is conferred by its charter may be inquired into by a proceeding at law or equity by a party injured, under the Act of 1871, but whether, for any reason, the charter was originally invalid or has been forfeited is a question which the Commonwealth alone can raise, by a proceeding in *quo warranto* at the relation of the Attorney General or possibly by *scire facias*.[36] Where a church was incorporated with no provision in its charter limiting its yearly income other than from real estate as required by Section 20,

(34) Sterling's Appeal, 111 Pa., 35 (1885); Germantown Pass. Ry. *v.* Citizens' Pass. Ry. Co., 151 Pa., 138 (1892); 31 W. N. C., 281; Phila. *v.* Phila. & R. R. Co., 25 W. N. C., 320 (1889).

(35) Packard *v.* Thiel College, 209 Pa., 349 (1904).

(36) Olyphant Sewerage Drainage Co. *v.* Borough of Olyphant, 196 Pa., 553 (1900); Western Penna. R. R. Co.'s Appeal, 104 Pa., 399 (1883); See Phila. & Merion R. R. Co.'s Petition, 187 Pa., 123 (1898) and Edgewood R. R. Co.'s Appeal, 79 Pa., 257 (1875).

But when the purpose for which a corporation of the first class was formed was not included in the provisions of any act of Assembly it was held that the court granting the charter might revoke it. "We are in no doubt of the power of the court to revoke this alleged charter. It never was a charter. It was not authorized by any act of Assembly and is absolutely void." National Endowment Co., 142 Pa., 450 (1891). Where, however, the purpose is within the provisions of law, the court granting the charter may not enter a rule to show cause why the decree granting the charter should not be annulled. Consol. Stock. Exchange of Phila., Op. Atty. Gen., 31 Pa. C. C. Rep., 226 (1905). See Chapter 22, Quo Warranto.

The Act of June 19, 1871, limits the inquiry to the nature and extent of the franchises *prima facie* conferred by the charter, but does not extend it to the consideration of the validity of the charter itself. Windsor Glass Co. *v.* Carnegie Co., 204 Pa., 459 (1903); Young *v.* York Haven Elec. Transmission Co., 15 D. R., 843 (1906); Bristol *v.* Goodyear Lumber Co., et al., 32 Pa. C. C., 647 (1906).

Act of April 20, 1854, the court refused to grant a rule to revoke the charter, holding that after proceedings and decree regular in form, an alleged substantial defect can only be set up by *quo warranto* at the suit of the Attorney General.[37]

It has been held that the following classes of persons have a status under the Act of June 19, 1871, P. L., 1361, to restrain corporations seeking to exercise the franchises named, and thus obtain an adjudication as to the possession or non-possession of such powers by such corporations: Owners of property abutting on a street on which a street railway company seeks to make an extension,[38] or on which a railroad attempts to lay its tracks,[39] or whereon an elevated railroad is sought to be built, there then being no law for the construction of such a railroad,[40] or where consent to the construction and operation of a railway has been granted upon conditions which are broken;[41], or upon which a manufacturing company operates a railroad;[42] owners of lands whose property is sought to be appropriated by a corporation;[43] street railway companies where other companies seek to occupy streets already occupied by the tracks of the first named companies.[44]

(37) Christ's Church Charter, 8 Pa. C. C., 28 (1890).

(38) Wirth et al. *v.* Phila. City Pass. Ry. Co., 2 W. N. C., 650 (1876).

(39) Penna. R. R. Co.'s Appeal, 115 Pa. 514 (1886).

(40) Potts *v.* Quaker City Elevated R. R. Co., 161 Pa., 396 (1894).

(41) Edwards *v.* Pittsburgh Junction R. R. Co., 215 Pa., 597 (1906).

(42) Barker et al., *v.* Hartman Steel Co., 129 Pa., 551 (1889); Hopkins *v.* Catasauqua Mfg. Co., 180 Pa., 199 (1897).

(43) Bly *v.* White Deer Mountain Water Company, 197 Pa., 80 (1900); Edgewood R. R. Co.'s Appeal, 79 Pa., 257 (1875).

(44) Germantown Pass. Ry. Co. *v.* Citizens' Pass. Ry. Co., 151 Pa., 138 (1892); See Edwards *v.* Pittsburg Junction R. R. Co., 215 Pa., 597 (1906). The case of Phila. & Gray's Ferry Pass. Ry. Co.'s Appeal, 102 Pa., 123 (1883) contains a dictum contra, but the case was decided upon different grounds. Junc. Pass. R. R. Co. *v.* Williamsport Pass. Ry. Co., 154 Pa., 116 (1893), held, only, that the court would not inquire whether the fact that the route of the street railway did not form a complete circuit prevented it from acquiring a franchise. Thirteenth and Fifteenth Sts. Pass. Ry. Co., et al., *v.* Southern Pass. Ry. Co., 15 Pa. C. C. Rep., 145 (1895); 3 D. R., 337, is contrary to the weight of authority and not supported by the cases cited therein. In Seitz, et al. *v.* Lafayette Traction Co., 5 Pa. C. C. Rep., 469 (1888), the complainants showed no other interest than that one of them was a stockholder in a corporation, the franchises of which were alleged to be infringed upon. Held, that such corporation had a status to enjoin infringing company, but its stockholders had none.

But a street railway company which leases its entire property to another corporation for nine hundred and ninety-nine years, which other corporation has by similar leases acquired all similar properties in a city and loses all of its tangible interests in its property so leased, has no status to enjoin the construction of a competing line.[45]

Notwithstanding the word "shall" in the Act of June 19, 1871, P. L., 1361, an injunction will not be granted unless a proper case for injunction be made out in accordance with the principles and practice of equity.[46] The fact that the receipts of a railroad company are diminished by the competition with it of a street railway company, does not give such railroad company a right to equitable relief against such passenger railway company under the Act of June 19, 1871. That act applies to direct, not to consequential, injuries to interests.[47]

Where no individual has sustained a private injury and the rights and franchises of no corporation are invaded, a corporation charged with an excessive exercise of power is amenable to the Commonwealth only and not to a private suitor.[48]

"Under the Act of 1871 the inquiry is limited to the grant in the charter to do the thing complained of. If the power is there given, the authority of the court to interfere is at an end. The further questions of good faith in obtaining the charter, or in acting under it, can only be raised by the Commonwealth."

Hence, where it appeared on a bill filed under said act that the defendant railroad company was regularly organized for the conveyance of persons and property, it was held that the bill could not be maintained on averments that the railroad was in fact a private railroad, located upon the property of a manufacturing company and used exclusively for the purposes of the company.[49]

47. Quasi Public and Private Corporations.

Private corporations are either quasi public or purely private.

(45) 13th & 15th Sts. Pass. Ry. Co. *v.* Broad St. Rapid Transit Ry. Co., 31 Pa. C. C. Rep., 99 (1904).

(46) Becker *v.* Lebanon & Myerstown St. Ry. Co., 188 Pa., 484 (1898); 43 Wl. N. C., 229.

(47) Penna R. R. *v.* Greensburg, Jeannette & Pittsburg St. Ry. Co., 176 Pa., 559 (1896).

(48) Minersville Boro. *v.* Schuylkill Elec. Ry. Co., 205 Pa., 402 (1903).

(49) Windsor Glass Co. *v.* Carnegie Co., 204 Pa., 459 (1903).

So far as cumulative voting is concerned, railroads have been held to be private corporations in Pennsylvania,[50] but the weight of authority seems to favor the belief that they are quasi public in their nature.[51]

The following classes of corporations have been held to be quasi public corporations, principally in litigation relative to taxation or mechanics' liens:

Street railway companies.[52]

Water companies,[53]

Natural gas companies.[54]

Artificial gas companies.[55]

Boom companies.[56]

Fire companies.[57]

Corporations to improve the navigation of rivers which are a part of the public domain.[58]

(50) Pierce *v.* Com., 104 Pa., 150 (1883).

(51) Foster & Co. *v.* Fowler & Co., 60 Pa., 27 (1868); approved in Girard Storage Co. *v.* Southwark Co., 105 Pa., 248 (1884); 15 W. N. C., 25; Smith *v.* Altoona & P. C. R. R. Co., 182 Pa., 139 (1897); and see McLeod *v.* Central Normal Assn., 152 Pa., 575 (1893); and Pittsburg's Appeal, 123 Pa., 374 (1889). The Supreme Court of the United States holds railroad companies to be quasi public corporations; U. S. *v.* Trans. Missouri Freight Assn., 166 U. S., 290, 321 (1897); Chic. etc. Ry. *v.* Wabash, etc. Ry., 61 Fed. R. 993.

(52) Christ *v.* Schuylkill Elec. Railway Co., 23 Pa. C. C., 353; Shepp *v.* Norristown Pass. Ry., 2 D. R., 679 (1893); 13 Pa. C. C., 254; Northampton County *v.* Easton Pass. Ry., 148 Pa., 282 (1892); Oberholzer *v.* Norristown Pass. Ry. Co., 16 Pa. C. C., 13 (1894).

(53) Guest *v.* Lower Merion Water Co., 28 W. N. C., 285 (1891); 142 Pa. 610; Foster *v.* Fowler, 60 Pa., 27 (1868).

(54) St. Mary's Gas Co. *v.* Elk County, 168 Pa. 401 (1895); Pittsburg's Appeal, 123 Pa., 374 (1889).

(55) Schuylkill County *v.* Citizens' Gas Co., 148 Pa., 162 (1892); Coatesville Gas. Co. *v.* Chester Co., 97 Pa., 476 (1881); McNeal *v.* West Pittsburg Gas Co., 4 W. N. C., 504 (1877).

(56) West Branch Boom Co. *v.* Pa. Joint L. & L. Co., 121 Pa., 143 (1888); Brown *v.* Susq. Boom Co., 109 Pa., 57-68 (1885).

(57) Gray *v.* Monong. Nav. Co., 2 W. & S., 156-60.

(58) Bethlehem Boro. *v.* Perseverance Fire Co., 81 Pa., 445 (1876).

48. Purely Private Corporations.

The following classes of corporations have been held to be purely private companies:

Market companies.[59]

Normal school companies.[60]

Elevator and warehouse companies.[61]

Banks.[62]

And all those which do not exist directly for the public use.

"In order for a private corporation to be regarded as quasi public, it must exist directly for the public use; the corporate franchise must be such as is held in the nature of a public trust, and such that the public has standing to assert and enforce its rights. If the public may assert a use by right, then the property of the corporation may be said to be in the direct use of the public at large, though under the control of a private person or of a corporation." [63]

(59) Twelfth St. Market Co. *v.* Phila. & R. Terminal R. R. Co., 142 Pa. 580 (1891); Allegheny County *v.* McKeesport Diamond Market Co., 123 Pa., 164 (1889).

(60) McLeod *v.* Central Normal School Assn., 152 Pa., 575 (1893).

(61) Girard Point Storage Co. *v.* Southwark Foundry Co., 105 Pa. 248 (1884).

(62) First Nat. Bank of Clarion *v.* Gruber, 87 Pa., 468 (1878).

(63) McLeod *v.* Central Normal School Assn., 152 Pa. 575 (1893).

CHAPTER III.

THE ACT OF APRIL 29, 1874—CORPORATIONS OF THE FIRST CLASS.

49. Review of Incorporation Acts passed Prior to the Passage of the Act of April 29, 1874.
50. General Powers Conferred by the Act of April 29, 1874.
51. Kinds of Corporations included in Class 1.
52. Corporations for Profit May be Formed Under Class 1.
53. Certificate of Incorporation—Charter.
54. Method of Obtaining Charters of Corporations of Class 1.
55. Income to be Limited.
56. Practice of the Courts in Granting Charters.
57. Incorporators.
58. Amount of Capital Paid In.
59. Requisites of the Charter.
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61. Notice of Intention to Apply for Charter.
62. Advertisement of Notice.
63. Charter Should be Filed in Prothonotary's Office.
64. Application for Charter Need not Necessarily be made on Day Mentioned in the Advertisement.
65. When Charters Will be Refused.
66. Church Charters.
67. Charters Will not be Refused When.
68. Granting of Charters within the Discretion of the Courts.
69. Corporations Not for Profit May Issue Capital Stock.

49. Review of Incorporation Acts Passed Prior to the Passage of the Act of April 29, 1874.

With the exception of railroad companies all corporations are now formed in Pennsylvania under the provisions of the Act of April 29, 1874, P. L., 73, and its supplements, or under those of subsequent acts modeled more or less upon that act, each providing for the formation of a specific class of corporations.

Section 46 of the Act of 1874 repealed the General Manufacturing Companies Act of April 7, 1849, the Mining Act of April 21, 1854, the Manufacturing Companies Act of July 18, 1863, and the Iron and Steel Companies Act of March 21, 1873,[1] so far as they provide for the creation of corporations for any of the purposes enumerated in said acts.

(1) See Miller Paper Co. *v.* York Paper Co., 34 Pa. Super. Ct., 315 (1907). As originally drawn the Act of 1874 did not repeal any law then ex-

As we have already seen, the Act of April 6, 1791, was probably repealed by the Constitution of 1874. There would seem, therefore, to be left in force, of the early general incorporation acts, only the Iron Companies Act of June 16, 1836, and its supplements, and the various acts conferring the power of incorporating companies upon the Courts of Common Pleas. Where the classes of corporations authorized to be formed by such acts are identical with the classes which said courts are authorized to incorporate by the Act of 1874, it is presumed that the latter act supersedes the former ones as to the formation of corporations of such classes.[2] Whether so much of said earlier acts as authorized Courts of Common Pleas to form corporations of other classes than those which they are permitted to incorporate by the Act of 1874, is still in force and effect may be queried.

The Act of April 29, 1874, was in no sense novel legislation. It was a codification of the best portions of already existing corporation law, with some new matter, having for its object the establishment of a uniform and convenient system for the formation and regulation of corporations.

The Act may be conveniently divided into two portions, the first including Sections 1 to 26 inclusive, relating merely to the formation and regulation of corporations generally, and the second, comprising the remainder of the Act, conferring special powers upon certain classes of corporations the creation of which is authorized by the first part, and providing specially for their regulation and management. The provisions of the first part will be considered seriatim; the sections comprising the second part will be inserted under the heads of the different classes of corporations to which they relate, respectively.

50. General Powers Conferred By the Act of April 29, 1874.

Corporations may be formed under the provisions of this act by the voluntary association of five (three)[3] or more persons, for the purposes, and in the manner mentioned herein,

isting, the object being to "set up a system which would be a harmonious one and into which the corporations of the Commonwealth might drift." See remarks of Mr. Wallace, Legislative Journal, 1874 p. 683.

(2) See St. Luke's Meth. Epis. Church, 17 Phila., 261 (1884); 41 Leg. Int., 74.

(3) Hereafter corporations for profit, embraced within corporations of the second class, defined in section two (2) of the Act to which this is a

and when so formed, each of them by virtue of its existence as such, shall have the following powers, unless otherwise specially provided:

First. To have succession by its corporate name for the period limited by its charter, and when no period is limited thereby, or by this act, perpetually, subject to the power of the General Assembly, under the Constitution of this Commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by law.

Fifth. To appoint and remove such subordinate officers and agents as the business of the corporation requires, and to allow them a suitable compensation.

Sixth. To make by-laws not inconsistent with law, for the management of its property, the regulation of its affairs and the transfer of its stock.

supplement, may be formed, under the provisions of said Act, by the voluntary association of three or more persons, and the charter of an intended corporation must be subscribed by two or more persons, one of whom, at least, must be a citizen of this Commonwealth.

Sec. 2. All laws or parts of laws inconsistent herewith be and the same are hereby repealed. Act of May 29, 1901, P. L., 326.

Hereafter corporations for profit, embraced within corporations of the second class, defined in section two (2) and the various supplements to said section two (2) of the act to which this is a supplement, may be formed, under the provision of said act, by voluntary association of three or more persons, and the charter of an intended corporation must be subscribed by two or more persons, one of whom, at least, must be a citizen of this Commonwealth. All corporations formed under the provisions of the several supplements of section two (2) of the act of April twenty-ninth, one thousand eight hundred and seventy-four, by the voluntary association of three or more persons, and the charter of said corporations having been subscribed by not less than two persons, one of whom was a citizen of this Commonwealth, and in which charters have been granted by the Governor of the Commonwealth of Pennsylvania, be and the same are hereby ratified and confirmed, to the same extent as though the said several supplements to the act of April twenty-ninth, one thousand eight hundred and seventy-four, had been a part and parcel of the original section two (2) of the act of April twenty-ninth, one thousand eight hundred and seventy-four.

Sec. 2. All laws or parts of laws inconsistent herewith be and the same are hereby repealed. Act of April 23, 1903, P. L. 272.

Seventh. To enter into any obligation necessary to the transaction of its ordinary affairs.[3*]

51. Kinds of Corporations Included in Class 1.

The purposes for which the said corporation may be formed, shall be as follows, and shall be divided into two classes:

CORPORATIONS NOT FOR PROFIT—FIRST CLASS.

1. The support of public worship.

2. The support of any benevolent, charitable, educational or missionary undertaking.

3. The support of any literary, medical or scientific undertaking, library association, or the promotion of music, painting or other fine arts.

4. The encouragement of agriculture and horticulture.

5. The maintenance of public or private parks, and of facilities for skating, boating, trotting and other innocent or athletic sports, including clubs for such purposes, and for the preservation of game and fish.

6. The maintenance of a club for social enjoyments.

7. The maintenance of a public or private cemetery.

8. The erection of halls for public or private purposes.

9. The maintenance of a society for beneficial or protective purposes to its members from funds collected therein.

10. The support of fire engine, hook and ladder, hose or other companies for the control of fire.[3**]

Supplement of April 17, 1876, Sec. 2, P. L., 30:—

11. For the encouragement and protection of trade and commerce.

12. For the formation and maintenance of military organizations.

Supplement of May 25, 1887, P. L., 266:—

For the prevention of cruelty to children and aged persons.

Act of May 22, 1895, P. L., 102:—

For the protection and saving of human life and of property in case of fire.

Act of June 25, 1895, P. L., 313:—

13. For the maintenance of a society for the improvement of

(3*) Sec. 1, Alt. Aps. 29, 1874, P. L., 73.
(3**) Sec. 2, Act April 29, 1874, P. L., 73.

the streets and public places in any city, borough or township in this Commonwealth.

Supplement of July 15, 1897, P. L., 283:—

14. For receiving and holding property, real and personal, of and for unincorporated religious, beneficial, charitable, educational and missionary societies and associations, and executing trusts therefor.[4]

Each of the said corporations may hold real estate to an amount the clear yearly value or income whereof shall not exceed twenty thousand dollars.[5] [6]

52. Corporations for Profit May be Formed Under Class 1.

An inspection of the enrolled copy of the Act of April 29, 1874, on file in the office of the Secretary of the Commonwealth, shows that the words "Not for Profit," prefixed to the enumeration of corporations of the first class, as well as the words "For Profit," prefixed to the enumeration of corporations of the second class, as the act is published in the pamphlet laws, were not contained in the act as it passed the General Assembly. It is stated that these words were taken from a pamphlet copy of the Act of

(4) The purposes enumerated in the ten classes provided for by the Act of 1874 were taken, in whole or in part, from the following named acts:

Class 1. Act April 6, 1791, (3 Sm. Laws, 20); Act Oct. 13, 1840, Sec. 13, P. L., 1841, 5.

Class 2. Idem.

Class 3. Idem; Act March 26, 1867, P. L., 44; Act Feb. 20, 1854, P. L., 90.

Class 4. Act Feb. 20, 1854, P. L., 90.

Class 5. Act March 26, 1867, P. L., 44; Act Feb. 15, 1871, P. L., 87; Act Feb. 27, 1872, P. L., 20.

Class 6. New.

Class 7. Act Feb. 20, 1854, P. L., 90.

Class 8. Act May 7, 1855, P. L., 477; Act Feb. 27, 1872, P. L., 20.

Class 9, Act April 8, 1833. See Com. *v.* Order of Vesta, 2 D. R., 254 (1903).

Class 10. Act Oct. 13, 1840, Sec. 13, P. L., 1841, 5; Act April 8, 1832, P. L., 238; Act March 26, 1867, P. L., 44.

(5) Sec. 2, Act April 29, 1874, P. L., 73. The remaining portion of Sec. 2 appears in Sec. 71.

(6) See Sec. 431. For extension of amount of property that religious, educational, charitable, etc., corporations may hold, see Sec. 432.

1874 which was published by its author, Mr. Wallace, before the pamphlet laws were printed.

In the debates in the General Assembly on the passage of this law no intention was expressed of confining corporations of the first class to those not for profit. On page 501 of the Legislative Journal Mr. Wallace says:

"The first class, as the Senate will notice, is composed of ten different kinds of organizations. They are those of churches, medical, literary, scientific and agricultural associations, and all those organizations that relate particularly to the home affairs of the people, and are not intended, *as a rule,* for profit."

And on page 687 he says further:

"The main thought of this bill is harmony and congruity—the establishment of a system by which the important organizations of the people which have no reference whatever to the right of eminent domain—those things that are organized at home—shall be under one class, and shall be recorded at home, and shall not come here, while those organizations that may eventually come under the taxing power of the State shall be in the second class."

When the Act of 1874 was amended by the supplement of April 17, 1876, the words above referred to were recited as part of the act to be amended and were enacted in the supplement, as also in all subsequent supplements amending or containing Sec. 2 of said act.

Notwithstanding the foregoing facts it has been held that in order for a corporation to be formed by the Courts of Common Pleas, it must be one "not for profit." [7]

But, on the other hand, it has been held [8] that a base-ball club, organized for profit, may be incorporated by the courts. In the consideration of the case referred to, Fell, J., said:

"The object and character of this organization comes within the exact language of the 5th head of the corporations of the first class, and the mere incident of profit is not sufficient to take it out of that class. Public halls are chartered by the courts, and they have always been organized for purposes of profit to the stockholders. The maintenance of grounds to which admission is charged comes within the powers of this class."

Pennypacker, J. "Cemetery companies are corporations for profit, and they are chartered by the courts. If such companies cannot be chartered

(7) Mut. Protective Assn., 3 Pa. C. C., 637; Richmond Retail Coal Co., 9 Pa. C. C., 172 (1890); Prospect Hill Cemetery Co., 1 Del. Co., 43C (1882); West Hill Land Co., 1 Del. Co., 431 (1882).

(8) Players' Nat. League Baseball Club, 25 W. N. C., 187 (1889).

by the courts they cannot be chartered at all. The legislature did not intend to take away from the stockholders of corporations that come within the first class, such as cemetery companies, the right to profits."

Hare, P. J. "Trotting parks are within the first class, and are maintained for profit. That profit is incidental does not nullify the power to charter."

The logical conclusion would, therefore, seem to be that the fact that a corporation is incidentally for profit should not prevent its incorporation by the courts under the Act of 1874, if it come within the objects enumerated in class one.

53. Certificate of Incorporation.

The charter of an intended corporation must be subscribed by five (two)[9] or more persons, three of whom, at least, must be citizens of this Commonwealth, and shall set forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted.
4. The term for which it is to exist.
5. The names and residence of the subscribers and the number of shares subscribed by each.
6. The number of its directors, and the names and residences of those who are chosen directors for the first year.
7. The amount of its capital stock, if any, and the number and par value of shares into which it is divided.

Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county for three weeks, setting forth briefly the character and object of the corporation to be formed, and the intention to make application therefor.[9*]

54. Method of Obtaining Charters of Corporations of Class 1.

The said certificates of incorporation of the first class shall be acknowledged by at least three of those who subscribe to them before the recorder of deeds of the county in which the business of the corporation is to be transacted,[10] to be their act

(9) See note to Sec. 50.

(9*) Sec. 3, Act April 29, 1874, P. L., 73.

(10) The Act of April 15, 1891, P. L., 18, provides that all certificates of association or articles of incorporation may be acknowledged and sworn to before a notary public of Pennsylvania, in the same manner and with

and deed, and the same being duly certified under the hand and official seal of the said recorder of deeds, shall be presented to a law judge of the said county, accompanied by proof of the publication of the notice of such application, who is hereby required to peruse and examine said instrument, and if the same shall be found to be in the proper form, and within the purposes named in the first class specified in the foregoing section, and shall appear lawful and not injurious to the community, he shall endorse thereon these facts, and shall order and decree thereon that the charter is approved, and that upon the recording of the said charter and order, the subscribers thereto and their associates shall be a corporation for the purposes and upon the terms therein stated, and the said order and charter shall be recorded in the office for the recording of deeds in and for the county aforesaid, and from thenceforth the persons named therein and subscribing the same, and their associates and successors, shall be a corporation by the name therein given.[11]

The provisions of so much of Sec. 3 as relates to the formation of corporations of the first class are largely taken from the Act of October 14, 1840, Sec. 13, P. L., 1841, p. 5, the first act conferring the power of forming corporations upon the Courts of Common Pleas.

55. Income to be Limited.

It shall be the duty of the court in granting a charter of incorporation for any purpose, to limit the yearly income of such corporation, other than from real estate, to such sum as in the opinion of the court will not be injurious or prejudicial to the community.[12]

56. Practice of the Courts in Granting Charters.

In the past the Courts of Common Pleas have been extremely

the same effect as if sworn to and acknowledged before the recorder of deeds of the proper county. See notes to Sec. 71.

(11) Sec. 3, Act of April 29, 1874, P. L., 73. This section, so far as it relates to corporations of the first class, is modeled upon Sec. 13, Act Oct. 13, 1843, P. L., 5.

(12) Sec. 3, Act Feb. 20, 1854, P. L., 90. It may be questioned whether this provision applies to corporations formed under the Act of April 29, 1874. See, however, Middletown Country Club, 30 Pa. C. C., 174 (1904); Mary Elizabeth Patterson Mem. Church, 17 Phila., 306 (1884); St. Luke's M. E. Church, 17 Phila., 261 (1884).

conservative in the matter of granting charters. Various requirements established by precedents have been insisted upon, which are not exacted by the Act of 1874, such as the showing of a necessity for incorporation, that the name must be in the English language, etc. The Supreme Court now holds, however, that the fact that no necessity for the incorporation of an association is shown is not a proper ground for rejecting a charter,[13] and that the name of a corporation need not be in the English language.[14]

In the case cited, the Court says:

"The privilege of incorporation, and the requirements to obtain it are wholly statutory. The courts are not entitled to grant or refuse the right except upon legal grounds, and the requirements fixed by law can neither be dispensed with, nor added to. Section 2 of the Act of April 29, 1874, P. L., 73, authorizes charters of incorporation 'for the maintenance of a club for social enjoyments.' The court undoubtedly may and should look into the nature of the proposed social enjoyment, to see that it is 'lawful and not injurious to the community,' and may require specific statements and evidence to that end. But necessity is not one of the requirements, and it is doubtful if it could ever be shown in the case of purely social clubs."

The same court also holds[15] that, under the Act of April 29, 1874, Sec. 2, Cl. 11, providing for corporations for "the encouragement and protection of trade and commerce," a charter may be granted for the promotion of the interest of a particular trade, as well as for the promotion of trade and commerce in general, reversing the decision of the court below.

In view of the liberal position taken by the Supreme Court and of the fact that the Courts of Common Pleas have not uniformly followed the precedents of other courts of the same character, and have not always even followed their own rulings in prior cases, it is not probable that all the requirements enumerated in the following sections will be insisted upon in any given case.

57. Incorporators.

Three of the five subscribers to articles of association of corporations of the first class must be citizens, and one of the two subscribers to the articles of association of a corporation of the second class must be a citizen of Pennsylvania under the pro-

(13) Deutsch-Amerikanischer Volksfest-Verein, 200 Pa., 143 (1901).
(14) Deutsch-Amerikanischer Volksfest-Verein, 200 Pa., 143 (1901).
(15) Roofing and Sheet Metal Contractors' Assn., 200 Pa. 111 (1901).

visions of Sec. 3 of the Act of April 29, 1874, and the supplement of May 29, 1901, P. L., 326, but the other incorporators need not be citizens of said State,[16] and apparently any alien friend may become a member of any corporation formed under the Act of 1874.[17] One Attorney General has held that married women may be incorporators of corporations of the second class,[18] and another Attorney General and a Deputy Attorney General have held that they cannot be such incorporators.[19] Married women, may, however, be incorporators of associations formed for purposes of learning, benevolence, charity and religion.[20] An unincorporated association is not such a "person" within the Act of 1874 as may be an incorporator.[21]

In all cases, married women shall be deemed and held qualified or free from any disability on account of coverture, for appointment and acting as corporators or officers of all associations incorporated heretofore, or that may be hereafter incorporated, for purposes of learning, benevolence, charity or religion. Act April 9, 1879, P. L., 16.

58. Amount of Capital Paid In.

While the Act does not require that the certificates of corporations of the first class having capital stock, shall set forth that any particular portion thereof has been paid in, the courts will not approve a charter where the amount contributed is not proportionate to the amount of capital needed for the transaction of the proposed business of the corporation.[22]

59. Requisites of the Charter.

The charter must be written or printed upon a single sheet of paper or parchment. Charters written on several sheets fastened

(16) Com. *v.* Detwiler, 131 Pa., 614 (1890).
(17) Com. *v.* Detwiler, 131 Pa., 614 (1890).
(18) Married Women Corporators, 18 Pa. C. C., 492 (1896).
(19) Potter Gas Company, 15 Pa. C. C., 347 (1883); Piso Co., 15 Pa. C. C., 348 (1894); New Century Club Society, 9 Pa. C. C., 355 (1891).
(20) First Independent Aid Society of Bloomfield, 1 D. R., 754 (1892).
(21) Hall Assn. of Washington Camp, etc., 10 D. R., 621 (1901); 26 Pa. C. C., 206.
(22) Hall Assn. of Washington Camp, etc., 10 D. R., 621 (1901); 26 Pa. C. C., 206.

with eyelets[23] or tied[24] or sewed[25] or clamped[26] together have been rejected. They must be free from erasures or interlineations[27] and no blanks must be left therein. Under the provisions of the Act of June 18, 1895, P. L., 209, charters may be in type-writing.

The name of the corporation need not be in the English language,[28] but must be distinctive, so as to indicate the character of the corporation.[29] It must not be so similar to that of another corporation as to cause confusion.[30]

(23) Tara Benevolent Society, 9 Phila., 287 (1874); 30 Leg. Int., 46; Monroe Republican Club's Charter, 19 Pa. C. C., 568 (1897); 45 Pitts. L. J., 52.

(24) Accountants Assn., etc., Charter, 18 Pa. C. C., 159 (1896); 5 D. R., 699; 44 P. L. J., 103.

(25) Alexander Presbyterian Church, 30 Pa., 154 (1858).

(26) St. Luke's M. E. Church, 17 Phila., 261 (1884); 41 Leg. Int., 74.

(27) Zion Church Charter, 5 D. R., 780 (1896); 18 Pa. C. C., 174; Alsatian Beneficial Assn., 35 Pa., 79 (1860); United Daughters of Cornish, 35 Pa. 80 (1860).

(28) In re Deutsch-Amerikanisher Volksfelt Verein, 200 Pa., 143 (1901) over-ruling the decision in same case below; 24 Pa. C. C., 489 (1900); 9 D. R., 753; Societa Italiana de Mutui Socoerso da Beneficienza, 24 Pa. C. C., 84 (1900); Society Principesso Montenegro Savaya, 6 D. R., 486 (1897).

(29) Nether-Providence Assn., 12 Pa. C. C., 666 (1892); 2 D. R., 702.

(30) A charter was refused to the "Waverly Ladies of the Red Cross" on the protest of the Society of the Red Cross, but was granted when the name was changed by amendment to "Order of the Waverly Ladies of the Red Cross." Waverly Ladies of the Red Cross, 12 Pa. C. C., 589 (1892); 1 D. R., 605; 30 W. N. C., 257.

A charter was refused to the "Grand Lodge of the *Independent* Order Sons of Progress," on exceptions filed by the "Grand Lodge of the Order Sons of Progress." In re Sons of Progress, 14 W. N. C., 31 (1883).

A charter was granted to the "'Columbus Security Order" against the protest of the "Universal Order of Security." In re Charter of Columbus Security Order, 27 W. N. C., 36 (1890). A charter was refused to "The First Presbyterian Congregation of Harrisburg" on the protest of the "English Presbyterian Congregation of Harrisburg." First Presbyterian Church of Harrisburg, 2 Gr., 240. See, generally, Duquesne College, 12 Pa. C. C., 491 (1891); 2 D. R., 555; Societa Militaire Italiano, 3 Pa. C. C., 441 (1887); United Hebrew Congregation's Charter, 11 York, 89 (1897).

A charter was refused to a church congregation under the name of the Polish National Catholic Church of St. Francis on the protest of the St. Francis Roman Catholic Church, and the Superior Court refused to review the discretion of the Court of Common Pleas in so doing. Polish Na-

The objects for which the corporation is formed must be clearly set forth [31] and the means by which those objects are to be attained, and must not be left to be determined by any form of constitution which the corporators may adopt.[32] The said objects must be definitely and distinctly stated; and proposed charters which add to the enumeration of objects such clauses as "for such other purposes as may be agreed upon by the association" [33] or state that the proposed objects are to be attained "by such means and measures as they may deem advisory or expedient" will be rejected.[34] It is not sufficient, in stating the objects of a corporation in a charter, to merely follow the language of the act,[35] but the division of the section of the act under which application is made must be mentioned.[36] The purpose must be a single one.[37] Where the object is social enjoyment, the nature of the enjoyment contemplated must be specifically set forth.[38] The

tional Catholic Church of St. Francis, 31 Pa. Super. Ct., 87 (1906). See St. Stanislaus Polish National Reformed Church of Scranton, 12 D. R., 532 (1903). See Sec. 75 for cases relating to interference of names of corporations of the second class.

(31) Ladies' Protestant Association, 22 Pa. C. C., 270 (1899); 8 D. R., 127.

(32) In re Supreme Temple of the Order of Plato, 42 Leg. Int., 44; 17 Phila., 401; Skandinaviska Brodrofornerigen Svea, 3 D. R., 235 (1894); 15 Pa. C. C., 516; Stevedores' Beneficial Association, 14 Phila., 130 (1880); 37 Leg. Int., 262; Xantha Beneficial Assn., 8 D. R., 142.

(33) Journalists' Fund Charter, 8 Phila., 272 (1871).

(34) Phila. Artisans' Institute Charter, 8 Phila., 229 (1871).

(35) McKees' Rocks, etc. Assn., 19 Pa. C. C., 537 (1897); 6 D. R. 477.

(36) Penna. State Sportsman's Assn., 11 Pa. C. C., 576 (1892).

(37) In re Master Builders' Exchange of Norristown, 12 D. R., 670 (1903).

(38) An application for a charter of a society for social enjoyments should set out:

1. The character of the social enjoyment.
2. Who are to be admitted as members—men or women, or both?
3. What are the conditions of membership?
4. When the purpose is "mutual improvement, intellectually, and for social enjoyment" the means and methods of intellectual improvements should be set out.
5. If the employment of teachers and the establishment of a library, whence the funds are to be derived.
6. The necessity for incorporation. La Fayette Club, 21 Pa. C. C., 243 (1898); Penn Farmers' Club, 24 Pa. C. C., 415; Americus Club, 6 D. R., 760 (1897); 20 Pa. C. C., 237; Braddock Club, 37 Pitts. L. J., 163 (1884);

charter of a beneficial association must show from whence the funds for carrying out its purposes are to be derived [39] and how they are to be applied.

An application for a charter of incorporation "for the protection of the rights and property of immigrants from Hungary and especially those of them who have become members of the society by rendering advice and assistance with reference to their legal and social relations, made necessary by reason of their ignorance of the language, custom and laws of the United States," will be refused, the purpose not coming within those enumerated in the corporation laws of this Commonwealth.[40]

A charter must show how and by what body by-laws may be adopted, and how the charter may be amended.[41] It should appear affirmatively that the objects contemplated are lawful and not injurious to the community.[42] Where a charter is asked for to carry out the provisions of a will the application therefor must strictly comply with such provisions or the charter will be refused,[43] and in such case a copy of the will should be attached to the application.[44] The names and addresses of the subscribers must be set forth in the charter,[45] and where an application states a given number of subscribers, and a less number have subscribed, the charter will be refused.[46] It should appear from the application that at least three of the subscribers and of the board of directors are citizens of Pennsylvania, and that all, or at least

Jacksonian Club, 11 Pa. C. C., 19 (1892); 1 D. R., 110; Young Men's Republican Club of the 28th Ward, 29 Pa. C. C. Rep., 141 (1903). See, however, Sec. 56.

(39) St. John's T. & A. B. Soc., 1 Lack. J., 73 (1886); Marvine Accidental Fund, 3 C. P., 36 (1886); Italian Mutual Beneficial Association, 4 D. R., 357 (1895); 15 Pa. C. C., 644; German General Beneficial Association of Phila., 30 Pa., 155 (1858).

(40) In re Hungarian Protective Society, 16 D. R., 80 (1906).

(41) In re Permanent Relief Assn. of Glade, 3 D. R., 236 (1894).

(42) North German Singing Society, 36 Pitts. L. J., 62 (1888); Braddock Club, 27 Pitts. L. J., 163 (1884); In re Celtic Club Charter, 15 D. R., 630 (1906).

(43) Foulke & Long Institute for Orphan Girls, 17 Phila., 207 (1884).

(44) Vaux's Appeal, 109 Pa., 497 (1885).

(45) Odd Fellows' Hall Assn., 1 Lack. Jur., 181 (1889); United Brethren Hebrew Congregations' Charter, 11 York, 89 (1897).

(46) Nether Providence Assn., 12 Pa. C. C., 666 (1892); Echo Park Protective Association, 5 Pa. C. C., 383 (1888); Evan. Lutheran Cong. of St. Stephen's Church, 6 Phila., 64 (1865).

a majority, are citizens of the United States.[47] The place where the business of the corporation is to be transacted must be specifically set forth.[48] Where the place of business was stated as the city of Philadelphia, "but it shall have power to transact business elsewhere," the charter was not approved.[49] A statement of the place where the office of the company is to be located is not sufficient.[50] When the corporation is to have capital stock, the amount thereof and the number and value of the shares should be set forth.[51] The names of the directors for the first year must be given,[52] and the board of directors should not be designated by a different name.[53] The number of directors may not, under the Act of May 14, 1891, P. L., 61, be less than three.[54] It must be a certain, not an indefinite number.[55] The term for which the corporation is to exist must be set forth in definite positive language.[56]

60. Membership.

A charter must show how the succession of corporators is to be maintained, and how new members are to be admitted, and the qualifications of such members.[57] But in the case of purely religious societies it would seem that strictness in this regard is not necessary.[58] At common law a member of a corporation

(47) Chinese Club, 1 D. R., 84 (1891); St. Ladislaus' etc. Assn., 19 Pa. C. C., 25 (1897).

(48) Christ's Evan. Lutheran Church, 5 Pa. C. C., 121 (1886); General Conference of the German Brethren Church, 12 D. R., 497 (1902).

(49) Supreme Temple of the Order of Plato, 17 Phila., 401 (1885).

(50) Enterprise Mutual Beneficial Assn., 32 Leg. Int., 82 (1875).

(51) Evangelical Lutheran St. Paul Assn.'s Charter, 3 Leg. Chron., 33 (1875).

(52) St. Ladislaus' etc. Society's Charter, 19 Pa. C. C., 25 (1897); St. John's T. A. B. Society, 1 Lack. Jur., 73 (1886).

(53) Marvine Accidental Fund, 3 C. P. Rep., 36 (1886).

(54) Germania Sangerbund, 12 Pa. C. C., 89 (1891).

(55) Evan. Lutheran Congregation, 6 Phila., 64 (1865); 22 Leg. Int., 357.

(56) In re Church of the Reconciliation, 14 D. R., 587 (1905).

(57) Permanent Relief Assn. of Glade, 3 D. R., 236 (1894); Accountants Assn. of Pitts. Charter, 18 Pa. C. C., 159 (1896); 5 D. R., 699; 4 Pitts. L. J., 103; Skandinaviska Brodroforengen Svea, 15 Pa. C. C., 516 (1894); Fort Washington Historical Society, 20 Pa. C. C., 84 (1897). See, however, In re Continental Benefit Society, 42 W. N. C., 183 (1898).

(58) United Brethren Hebrew Congregation's Charter, 11 York, 89 (1897).

can be expelled only when he has been guilty of some infamous offense, or has done some act tending to the destruction of the society.[59] If, therefore, it is desired to provide for the expulsion of members for other causes, a proper provision should be inserted in the charter. Charters providing for the expulsion of members "guilty of actions which may injure the association;" [60] or committing "any misdemeanor or any other act that may prove injurious to his character or standing;" [61] or "guilty of any offense against the law," [62] or "guilty of unprofessional decorum or ungentlemanly conduct," [63] have been refused, for the reason that the offenses made the ground of expulsion were too vague and indefinite.

Nothing should be contained in the charter which is supplied by the act of incorporation and its supplements. Thus it is unnecessary to limit the amount of real estate which a corporation may hold,[64] but the income from other sources than real estate must be limited, as provided by the Act of Feb. 20, 1854, P. L., 90, Sec. 3.[65] Matters of regulation of internal government such as dues, duties of officers and time of meeting should be omitted and inserted in the by-laws.[66] The by-laws must not be made part of the articles of association.[67]

A provision in a charter limiting the power of a majority of the members to dissolve it will not be approved,[68] nor one requiring the consent of two-thirds of the members to the sale or encumbering of the corporate property. Christ Church of Beaver Falls, 5 Pa. C. C., 121 (1886).

(59) Weiss et al. *v.* Musical Mut. Protective Assn., 189 Pa., 446 (1899).

(60) Butchers' Beneficial Assn., 35 Pa., 151 (1860).

(61) Butchers' Beneficial Assn., 38 Pa., 298 (1861); Sarsfield Beneficial Society, 22 Leg. Int., 357.

(62) Beneficial Association of Brotherly Unity, 38 Pa., 299 (1861).

(63) Journalists' Fund Charter, 8 Phila., 272 (1871).

(64) School Assn's Charter, 1 Leg. Rec., 133 (1879); Asbury A. M. E. Church, 1 Del. Co., 415 (1883); Odd Fellows' Hall Assn., 1 Lack Jur., 181 (1889).

(65) Mary Elizabeth Patterson Mem. Church, 17 Phila., 306 (1884); 41 Leg. Int., 253; St. Luke's M. E. Church, 17 Phila., 261 (1884). See Sec. 55.

(66) Mary E. Patterson Mem. Church, 17 Phila., 306 (1884); 41 Leg. Int., 253.

(67) Society Principesso Montenegro Savoya, 6 D. R., 486 (1897).

(68) United Daughters of Cornish, 35 Pa. 80 (1860); German General Benefit Assn., 30 Pa., 155 (1858).

Articles of incorporation should conclude with the customary "witness our hands and seals," though a simple subscription may satisfy the law.[69]

61. Notice of Intention to Apply for Charter.

Such notices must set forth the place at which and the time when the application will be made [70] but where protest was made against the issue of a charter because the notice of intention did not state the time and place of application, it appearing that the protestants had actual notice thereof, the exception was dismissed.[71] And so, when, through a misprint in the advertisement, the time was stated as "Saturday, May 29," instead of "Wednesday, May 29," the only persons likely to object being the protestants who had actual notice of the real date, the charter was granted.[72] But where the name of the proposed corporation was misprinted, the notice was held to be insufficient.[73] A properly advertised notice will not be rejected because a wider purpose is stated therein than the law will permit a charter to contain.[74]

62. Advertisement of Notice

Must not be printed in trade journals which are not newspapers of general circulation within the meaning of the Act of 1874,[75] and where publication is made in the Legal Intelligencer it must also be made in two papers of general circulation.[76] Notices need not be published in a German newspaper in cities of the first and second classes, the Act of July 2, 1895, P. L.,

(69) St. John's T. A. B. Soc., 1 Lack. Jur., 73 (1886).

(70) Parrish M. E. Church's Application, 3 Luz. Leg. Reg., 128 (1874); 21 Pitts. L. J., 204; Enterprise Mut. Ben. Association's Application, 10 Philadelphia, 380 (1875); 32 Leg. Int., 82.

(71) Evangelical Lutheran St. Paul Assn., 3 Foster, 33 (1875).

(72) Penna. Elec. Light Co.'s Application, Op. Sec. Com. 4 D. R., 438 (1895); 16 Pa. C. C., 502.

(73) St. Ladislaus' etc. Society's Charter, 19 Pa. C. C., 25 (1897), where the name "St. Ladislaus' Roman Catholic Sick and Beneficial Society" was printed "The St. Lazle Hungarian" etc. Society.

(74) Sowego Water & Power Co,, 16 Pa. C. C., 179 (1895).

(75) In re Charter New Gas Light Co., Op. Sec. Com., 1 Dauph. Co. Rep., 22 (1898).

(76) Enterprise Mut. Ben. Assn.'s Application, 10 Phila., 380 (1875); 32 Leg. Int., 82; Application for Charter, 33 Leg. Int., 158 (1876).

426, not being applicable thereto,[77] and it would seem, generally, that a publication in a German newspaper is not such an advertisement as is contemplated by the Act.[78]

Where it is averred in the proof of publication that the newspapers named therein are newspapers of general circulation and there is upon the record nothing to contradict such assertion, or suggest the propriety of an investigation into its truth, the court will ordinarily accept the averment as true.[79]

63. Charter Should be Filed in Prothonotary's Office

Contemporaneously with the publication of the intention to apply for charter.[80]

64. Application for Charter Need Not Necessarily be Made on Day Mentioned in the Advertisement

When the delay is not so great as to suggest bad faith, or raise a fair implication of the abandonment of the application, or is likely to have permitted circumstances to intervene whereby conditions have been so changed as to render improper the entry of a decree which would have been unobjectionable before.[81]

65. When Charters Will be Refused.

Political clubs may not be incorporated,[82] but it seems that there is no objection to the incorporation of a club the name of which indicates a certain political association or belief, where the only stated object is social enjoyment.[83] Marriage aid associations will not be incorporated, the same being contrary to

(77) Charter Notices, Op. Atty. Gen., 4 D. R., 771 (1895); 17 Pa. C. C. 169; In re Church Club of Philadelphia, 37 W. N. C., 47 (1895).

(78) Chartiers' Ferry Company, Op. Atty. Gen., 2 Chest. Co., 91 (1875).

(79) In re Mt. Penn Fire Co., 14 D. R., 873 (1905).

(80) In re Charter Church of the Holy Communion, 8 W. N. C., 357 (1880); 37 Leg. Int., 124; St. Luke's M. E. Church, 17 Phila., 261 (1884).

(81) In re Mt. Penn Fire Co., 14 D. R., 873 (1905).

(82) Monroe Republican Club, 6 D. R., 515 (1897); 45 Pitts. L. J., 52; 19 Pa. C. C., 568; 3 Lack. L. N., 285; Union League of Del. County, 1 Del. Co., 21 (1881); Alpha Assn., 15 W. N. C., 208 (1884); Ton-a-lu-ka Club, 12 Pa. C. C., 26 (1892). Such clubs are, however, sometimes incorporated. See McClintock v. Young Republicans of Philadelphia, 210 Pa., 115 (1904).

(83) In re Charters Central Dem. Assn. and the Young Repub. Club, 8 Pa. C. C., 392 (1889); 46 Leg. Int., 380; 19 Phila., 317.

public policy,[84] but such an association seems to have been incorporated in Berks county. Hessinger *v.* Ammon et al., 160 Pa. 245 (1894). Charters have been refused where it appeared that the objects sought to be obtained could be effectively carried out without incorporation,[85] but it has been held by the Supreme Court that a charter may not be refused except upon legal grounds, and the absence of a necessity for incorporation is not a valid reason for refusing a charter.[86] Organizations of foreign born citizens for the purpose of military drill and organization,[87] or the proposed charters of which provide that no language but a foreign one shall be spoken at their meetings[88] will not be incorporated, and, generally, corporations for the perpetuation of foreign customs and institutions will not be formed.[89]

An application for a charter for a corporation with the purpose "for the protection of the rights and property of immigrants from Hungary, and especially those of them who have become members of the society, by rendering advice and assistance with reference to their legal and social relations made necessary by their ignorance of the language, custom and laws of the United States" will be refused, such purpose not falling within those enumerated by the corporation laws of Pennsylvania.[90]

While the Act of April 29, 1874, does not require that any per cent. of the capital stock of a corporation of the first class shall

(84) Helping Hand Marriage Assn., 38 Leg. Int., 423 (1881); 15 Phila., 644; Mut. Aid Assn., of N. A., 38 Leg. Int., 423 (1881); 10 W. N. C., 468; Quaker City Marriage Benefit Assn., 10 W. N. C., 467 (1881).

(85) St. John Baptist's Ben. Society's Application, 13 Montg. Co., 95 (1897); Dutch Nove Doby, 165, 40 Pitts. L. J., 325 (1893); 3 D. R., 215; 12 Pa. C. C., 552; Ton-a-lu-ka Club, 12 Pa. C. C., 26 (1892); Chinese Club, 1 D. R., 84 (1891); Accountants' Assn. of Pitts. Charter, 18 Pa. C. C., 159 (1896); 5 D. R., 699; 44 Pitts. L. J., 103; Master Granite and Blue Stone Cutters' Assn., 9 D. R., 359 (1900); Jr. Order United American Mechanics, 10 D. R., 5 (1901).

(86) Deutsch-Amerikanischer Volksfest Verein, 200 Pa., 143 (1901).

(87) Russian American Guard, 13 Pa. C. C., 148 (1893); 40 Pitts. L. J., 402.

(88) St. Ladislaus' etc. Society's Charter, 19 Pa. C. C., 25 (1897).

(89) Germania Sangerbund, 12 Pa. C. C., 89 (1891); Italian Mutual Benefit Assn., 15 Pa. C. C., 644; 4 D. R., 357 (1895); Dutch Nove Doby, No. 165, 40 Pitts. L. J., 325 (1893); 3 D. R., 215; 12 Pa. C. C., 552; In re "Regina Elina," 14 D. R., 476 (1904).

(90) In re Hungarian Protective Society, 16 D. R., 80 (1906).

be paid in before its incorporation, yet there should be a reasonable contribution to the capital stock, and $35 is too small a portion of $20,000 to constitute such reasonable portion.[91]

Corporations may not be formed for the carrying out of two distinct objects, such as "to support the worship of Almighty God" and to "maintain a cemetery," [92] and a charter was refused where two churches proposed to unite to obtain incorporation, but to remain separate and distinct in their worship, business, internal government and ownership of property.[93]

Charters will not be granted to educational institutions giving the power to confer degrees,[94] the Act of 1874 giving no authority for the granting of such a power. Charters have been refused to corporations formed for profit, but upon this subject see Sec. 48.

Under the provisions of the Supplement of June 10, 1893, P. L., 435, for the formation of corporations for the encouragement and protection of trade and commerce charters may be granted for the promotion of the interest of a particular trade, as well as for the promotion of trade and commerce in general.[95] A stock exchange association may be incorporated under said supplement.[96] A charter was refused to a hospital intended to provide a home during first pregnancy and confinement of impecunious unmarried women, because the management did not propose to blazon the shame of their patients abroad.[97] Incorporation has been refused to a Christian Scientist church, in con-

(91) Hall Assn. of Washington Camp, etc., 10 D. R., 621 (1901).

(92) Evangelical Lutheran & Ref. Congregations, 6 Montg. Co., 13 (1889).

(93) German Lutheran & Reformed Church, 9 Pa. C. C., 12 (1890).

(94) Duquesne College, 12 Pa. C. C., 491 (1891); 2 D. R., 555. And see Medical College of Philadelphia, 3 Whart., 445 (1838). Institutions of learning with power to confer degrees, may, however, be incorporated by Courts of Common Pleas under the provisions of the Act of June 26, 1895, P. L., 327; see Chapter 33.

(95) Roofing and Sheet Metal Contractor's Association of Phila., 200 Pa., 111 (1901) over-ruling Master Granite & Blue Stone Cutters' Assn., of Phila., 9 D. R., 357 (1900); Roofing & Sheet Metal Contractors' Assn., Id., 569; Journeymen House Painters' Protective Assn., Id., 571; Phila. Jobbing Confectioners' Assn., Id., 572. See Richmond Retail Coal Co., of Phila., 9 Pa. C. C., 172 (1890).

(96) Pittsburg Stock Exchange's Application, 43 Pitts. L. J., 308 (1896).

(97) Prince of Peace Hospital, 11 D. R., 242 (1902).

nection with which there was to be exercised a system for the treatment of disease,[98] to an "Electropathic Institute," which contemplated giving instructions in electricity, magnetism, etc., as curative agents, and granting the degree of "doctor of electricity,"[99] and to an association the object of which was to recover property stolen from its members or to pay the loss in the event of a failure to recover,[100] because it would be against public policy to charter such a company unless among its duties were included that of detecting and arresting the thieves.

An application for a charter for a fishing and hunting club will be denied when it does not appear that the applicants have any proprietary rights in the territory designated.[1]

66. Church Charters.

Charters will not be granted to churches when the articles of association give minors membership and the right to vote;[2] where power is proposed to be given to the majority to sever at will connection with the superior ecclesiastical body of which the church is a member;[3] where the application contains a clause prohibiting the corporation from disposing of its real estate "without the consent of the Convention of the Protestant Episcopal Church of Pennsylvania";[4] where the proposed charter does not contain a provision that the property of the church shall be subject to the control and disposition of its lay members, as required by the Act of June 2, 1887, P. L., 298, amending the seventh section of the Act of April 26, 1855, P. L., 328;[5]

(98) First Church of Christ Scientist, 20 Pa. C. C., 241 (1897); 6 D. R., 745; 41 W. N. C., 259; First Church of Christ Scientist, 2 Blair, 203 (1902); First Church of Christ Scientist, 205 Pa., 543 (1903).

(99) American Electropathic Institute, 9 W. N. C., 31 (1880).

(100) Solebury Mut. Protective Assn., 3 Pa. C. C., 637 (1885); 4 C. P. Rep., 11; 3 Montg., 56.

(1) Sullivan County Fishing & Hunting Club, 16 D. R., 650 (1907).

(2) Mary Eliz. Patterson Mem. Church Charter, 17 Phila., 306 (1884).

(3) Zion Evangelical Church. 18 Pa. C. C., 174 (1896); 5 D. R., 780.

(4) St. Paul's Church, 30 Pa., 152 (1856); 2 Phila., 132.

(5) Alexander Presbyterian Church, 30 Pa., 154 (1858); English Baptist Church of Shenandoah, 3 Kulp, 145 (1883); 2 Del. Co., 191; 13 Luz. L. Reg., 329. See also, Christ Evan. Luth. Church, 5 Pa. C. C., 121 (1886); Reformed Episcopal Church's Case, 12 Phila., 516 (1878); 35 Leg. Int., 70; Powelton Ave. Bap. Church's Charter, 15 Phila., 325 (1882); West Park Ave. M. E. Church, 12 Phila., 518 (1878).

where the proposed charter does not set out the place where the business of the corporation is to be transacted;[6] place a limit on the value of the real and personal estate of the corporation;[7] nor fully set forth the doctrines of the church so that the court may determine whether the purpose of incorporation is lawful and not injurious to the community.[8] Church charters may now only be granted under the Act of 1874.[9] A schismatic body within a church may be incorporated but not under a misleading name.[10]

67. Charters Will Not be Refused

Because the corporations created thereby may possibly abuse their powers, in the absence of proof that such abuse would necessarily follow.[11]

68. Granting of Charters Is a Matter in the Discretion.

Of the Court of Common Pleas, under the Act of April 29, 1874, and no appeal lies from their decision, but a certiorari will lie so far as to see whether they have acted in accordance with the said act.[12]

On the granting of a charter the prothonotary should make a minute of the proceedings and decree in the proper docket, and deliver the charter to the corporation, after it has been duly recorded.[13] On the refusal of a charter the application may not be withdrawn, being a court record.[14]

(6) Christ Evan. Luth. Church, 5 Pa. C. C., 121 (1886).

(7) West Park Ave. M. E. Church's Application, 12 Phila., 518 (1878); 35 Leg. Int., 222; Mary Eliz. Patterson Mem. Church's Case, 17 Phila., 306 (1884); 41 Leg. Int., 253.

(8) Elimar Mira Mitta Cong. of the Lord, 17 Phila., 58 (1885); 42 Leg. Int., 286.

(9) St. Luke's M. E. Church, 17 Phila., 261 (1884); 41 Leg. Int., 74.

(10) Mother of God Church, 5 Lack., 128.

(11) Evangelical etc., School Assn.'s Charter, 1 Leg. Rec. R., 133 (1879); Lake Wynola Assn., 3 Pa. C. C., 626 (1887); Highland Cemetery Co., 4 D. R., 653 (1895).

(12) Appeal of Vaux, Executor, 109 Pa., 497 (1885); 16 W. N. C., 229. See In re Amendment of Charter of Grand Lodge A. O. U. W., 17 W. N. C., 343 (1885).

(13) Union A. M. E. Church of West Chester, 1 Chest. Co., 459 (1882); 3 York, 109.

(14) Phila. Relief Assn., 7 W. N. C., 146 (1879).

69. Corporations Not For Profit May Issue Capital Stock.

All corporations organized not for profit, under the provisions of "An act to provide for the incorporation and regulation of certain corporations," approved April 29, one thousand eight hundred and seventy-four and the several supplements thereto, shall have authority, if a majority of its members shall so ordain, to issue capital stock to an amount not exceeding two hundred and fifty thousand dollars, in shares of the par value of fifty dollars. Said power to vest upon the recording of the minute authorizing said issue, in the county in which the corporation was created, and filing an exemplification thereof with the Secretary of the Commonwealth. Thereafter such corporations shall be subject to the same taxation as corporations for profit.[15]

(15) Sec. 1, Act of June 25, 1895, P. L., 310.

CHAPTER IV.

ACT OF APRIL 29, 1874—CORPORATIONS OF THE SECOND CLASS.

70. Provisions for the Formation of Corporations of the Second Class.
71. The Certificate of Incorporation.
72. Forms of Certificates of Incorporation.
73. Practice of the Office of the Secretary of the Commonwealth.
74. Who May be Incorporators.
75. Name of the Corporation.
76. The Place of Business.
77. Statements of Purpose of Incorporation.
78. The Payment of Ten Percentum of the Capital Stock.
79. Amount of Capital Stock.
80. The Names of the Directors.
81. Notice of Intention to Apply for Charter.
82. Time for Filing Applications in the State Department.
83. Protests Against the Issue of Letters Patent.
84. Power of Governor in the Granting of Charters.
85. Recording Certificate of Incorporation.
86. Validation of Acts of Traction Companies Done Before Recording Their Charters.
87. Validation of Acts Done by Corporations Formed under the Act of April 29, 1874, before Recording their Charters.

70. Provisions for the Formation of Corporations of the Second Class. (Clauses in Brackets Repealed or Superseded.)

Sec. 2. The purposes for which the said corporation may be formed shall be as follows, and shall be divided into two classes:

. . . . . .

CORPORATIONS FOR PROFIT—SECOND CLASS.

The second class, those for—

1. [The insurance of the lives of domestic animals.[1]]
2. [The insurance of human beings against death, sickness or personal injury.[2]]

(1) This and Clause 2 are repealed by the Act of May 1, 1876, P. L., 53, which provides generally for the incorporation of insurance companies.

(2) See Note 1.

3. The prevention and punishment of theft or wilful injuries to property, and insurance against such risks.

4. [The construction and maintenance of any species of road other than a railroad, and of bridges in connection therewith.]

The grading, curbing, paving or macadamizing, construction and maintenance of any species of streets, roads or highways, and the furnishing of the materials of labor thereof, or construction and maintenance of any species of road other than a railroad, and of bridges in connection therewith.[3]

5. The construction and maintenance of a bridge over streams within the State.

6. [The construction and maintenance of a telegraph line.]

Corporations of the second class may be formed and created in the manner provided for by the act to which this is a supplement, and with all the rights and powers therein granted for the purpose of constructing, maintaining and leasing lines of telegraph for the private use of individuals, firms, corporations, municipal and otherwise, for general business and for police, fire alarm or messenger business, or for the transaction of any business in which electricity, over or through wires, may be applied to any useful purpose.[4]

7. The establishment and maintenance of a ferry.

8. The building of ships, vessels or boats, and carriage of persons and property thereon.

9. [The supply of water to the public.]

The supply of water to the public, or the supply, storage,

(3) Supplement of May 24, 1887, P. L., 186. The Act of April 10, 1893, P. L., 435, which was evidently drawn by an incompetent draughtsman and was, apparently, distorted by an incapable transcribing clerk, and which was approved by Governor Pattison with reluctance, in re-enacting the 2nd Section of the Act of April 29, 1874, for the purpose of adding a twenty-fifth class to corporations of the second class, re-enacts Clauses 1 and 2, notwithstanding their repeal by the Act of May 1, 1876, P. L., 53, as well as Clauses 4 and 9, notwithstanding the fact that the former was superseded, as above stated, by the Act of May 24, 1887, P. L., 186, and the latter by Act of May 16, 1889, Sec. 1, P. L., 226.

(4) Act of May 1, 1876, P. L., 90; Act of June 25, 1885, P. L., 164.

or transportation of water and water power for commercial and manufacturing purposes.[5]

10. [The supply of ice to the public.]
The supply of ice to the public, and the establishment of a system of refrigeration by which the public may obtain materials for refrigerating purposes through pipes or conduits from central stations.[6]

11. [The manufacture and supply of gas, or the supply of light or heat to the public by any other means.]
The manufacture and supply of gas, or the supply of light, heat and power by means of electricity, or the supply of light, heat or power to the public by any other means.[7]

12. The transaction of a printing and publishing business.

13. [The establishment and maintenance of an hotel or boarding house, opera and market house, or either.]
The establishment and maintenance of an hotel and drove yard or boarding house, theatre, opera and market house, livery or boarding stable, or either.[8]

14. [The creating, purchasing, holding and selling of patent rights for inventions and designs, with the right to issue license for the same and receive pay therefor.]
The creating, purchasing, holding and selling of patent rights for inventions and designs, and the purchasing of copyrights for books, publications and registered trade marks, with the right to issue license for the same and receive pay therefor.[9]

15. Building and loan associations.

16. [Associations for the purchase and sale of real estate and for safe deposit companies.]
Associations for the purchase and sale of real estate, or for holding, leasing or selling real estate, for maintaining or erecting walls or banks for the protection of low-lying lands, and for safe deposit companies, and for buying,

(5) Sec. 1, Act of May 16, 1889, P. L., 226.
(6) Act June 24, 1895, P. L., 253.
(7) Act May 8, 1889, P. L., 136.
(8) Act April 17, 1876, P. L., 30; the Act of May 29, 1901, P. L., 344, added theatre companies to those enumerated in the Act of 1876.
(9) Act May 16, 1889, P. L., 241.

selling, vending or dealing in any kind or kinds of goods, wares and merchandise at wholesale.[10]

17. [The manufacture of iron or steel or both, or of any other metal, or of any article of commerce from metal or wood or both.]

The manufacture of iron or steel or both, or of any other metal, or of any article of commerce from metal or wood, or both, and the manufacture and production of silverware, plated ware, jewelry, works of ornament and art, and pictures, and the buying and selling of such articles.[11]

18. [The carrying on of any mechanical, mining, quarrying or manufacturing business, including all of the purposes covered by the provisions of the acts of the General Assembly, entitled "An Act to encourage manufacturing operations in this Commonwealth," approved April 7, 1849, entitled "An Act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July 18, 1863, and the several supplements to each of said acts, including the incorporation of grain elevator, storage warehouse and storage yard companies; and also including the storage and transportation of water, with the right to take rivulets and land, and erect reservoirs for holding water, and excluding the distilling or manufacture of intoxicating liquors.]

The carrying on of any mechanical, mining, quarrying or manufacturing business, including all the purposes covered by the provisions of the acts of the General Assembly, entitled "An Act to encourage manufacturing operations in this Commonwealth," approved April seventh, one thousand eight hundred and forty-nine, entitled "An Act relating to corporations for mechanical, manufacturing, mining and quarrying purposes," approved July eighteenth, one thousand eight hundred and sixty-three, and the several supplements to each of the said acts, including the incorporation of grain elevator, storage house and storage yard companies; also including companies for the storage, transportation and furnishing of

(10) Act June 25, 1895, P. L., 295. There was a prior amendment of April 17, 1876, P. L., 30.

(11) Act June 3, 1893, P. L., 287.

water, with the right to take rivulets and land and erect reservoirs for holding water, for manufacturing and other purposes, and for the creation, establishing, furnishing, transmission and using of water power therefrom; the construction of dams in any stream, and the driving and floating of saw logs, lumber and timber on and over any stream not exceeding thirty-five miles in length from their (its) source, by the usual methods of driving and floating logs, timber and lumber on streams, and so as not obstruct the descending navigation by rafts and boats; also including the manufacture and brewing of malt liquors, and also including companies for the transaction of any lawful business not otherwise specifically provided for by act of Assembly: Provided, however, that no corporation shall be chartered under this amendment with the authority to transact more than one kind of business, which must be set forth in the charter. And companies may be organized under this Act having the right to transport, store, insure and ship petroleum, and for that purpose to lay down, construct and maintain pipes, tubing, tanks, offices and such other machinery, devices or arrangements as may be necessary to fully carry out that right; and also with the right to enter upon, take and occupy such land and other property as may be requisite for the purposes of such corporations.[12]

(12) The amendments to clause 18 have been as follows:

The Act of April 10, 1879, P. L., 20, amended the clause by substituting for the words "and excluding the distilling and manufacturing of intoxicating liquor," the following: "also including the manufacturing and brewing of malt liquors, but excluding the distilling and manufacturing of spirituous liquors."

The Act of June 2, 1883, P. L., 61, added a provision for the incorporation of oil and pipe line companies which is given above at the conclusion of the clause, but which through inadvertence has been omitted from the clause in subsequent amendments thereof. This omission does not, however, effect the repeal of this provision. Lehigh Valley Coal Co. *v.* U. S. Pipe Line Co., 3 D. R., 70 (1893).

The Act of June 22, 1883, P. L., 156, added the provision relative to the construction of dams and the driving of logs.

The Act of May 21, 1889, P. L., 259, added the provision for the furnishing of water and water-power.

The Act of June 10, 1893, P. L., 412, amended the clause so as to permit logging companies to operate on streams not exceeding thirty-five

19. The insurance of owners of real estate, mortgagees and others interested in real estate, from loss by reason of defective titles, liens and incumbrances.
20. The re-chartering of corporations of either of these classes, the charters whereof are about to expire.
21. The construction and maintenance of a wharf or wharves for public and private use, and the maintenance of any unincorporated wharf or wharves already constructed.[13]
22. The construction, erection and maintenance of observatories for public use or scientific purposes.
23. The formation and operation of stage and omnibus lines.
24. [The formation and operation of inclined planes for the transportation of passengers and freight.]
    The formation and operation of inclined planes for the transportation of passengers and freight, or for the construction and maintenance of tunnels and underground passageways.[14]
25. The construction and maintenance of sewers, culverts, conduits and pipes, with all necessary inlets and appliances for surface and undersurface and sewage drainage for the health, comfort and convenience of inhabitants, and sanitary improvement in cities, boroughs and townships of this Commonwealth, and for this purpose to enter upon and occupy any public highway, with the consent of the local authorities.[15]

Besides the classes of corporations above enumerated, the incorporation of the following classes of corporations with

miles in length, instead of twenty miles, as provided in the Act of June 22, 1883, P. L., 156, *Supra.*

The Act of June 10, 1893, P. L., 435, citing the whole of Section 2 of the Act of April 29, 1874, for amendment, cites and re-enacts clause 18 as it originally stood in the Act of 1874.

The Act of July 9, 1901, P. L., 624, omitted from the clause the words "but excluding the distilling and manufacturing of spirituous liquors," and inserted the provision for the incorporation of "companies for the transaction of any lawful business not otherwise specifically provided for by Act of Assembly."

(13) Clauses 21, 22, 23 and 24 were added by the Act of April 17, 1876, P. L., 30.

(14) Clause 24, inserted by Act of April 17, 1876, P. L., 30, was amended as above by Act of June 25, 1895, P. L., 310.

(15) Inserted by Act of June 10, 1893, P. L., 435.

the powers of corporations of Class 2 are authorized by the following acts:

Boulevard Companies. Act of June 26, 1895, P. L., 382. Supplement of April 28, 1899, P. L., 71.

Bourse Companies. Act of June 10, 1893, P. L., 417.

Cable Companies. Act of June 13, 1883, Sec. 6. P. L., 122.

Ship Canal Companies. Act June 24, 1895, P. L., 221. Supplement of June 8, 1907, P. L., 482.

71. The Certificate of Incorporation.

Sec. 3, Act of April 29, 1874. The charter of an intended corporation must be subscribed by five (two) or more persons, three (one) of whom at least must be citizens (a citizen) of this Commonwealth,[16] and shall set forth:

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted.
4. The term for which it is to exist.
5. The names and residences of the subscribers and the number of shares subscribed by each.
6. The number of its directors and the names and residences of those who are chosen directors for the first year.
7. The amount of its capital stock, if any, and the number and par value of shares into which it is divided.

Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county, for three weeks, setting forth briefly the character and object of the corporation to be formed, and the intention to make application therefor.

. . . . . .

The certificate for a corporation embraced within the second class, named in the foregoing section, shall set forth all that is hereinbefore required to be set forth,[17] and, except building and loan associations, shall also state that ten per centum of the capital

(16) The Acts of May 29, 1901, P. L., 326, and April 23, 1903, P. L., 272, provide that three or more persons may form a corporation of the second class, and two subscribe the certificate. See note to Sec. 50.

(17) See Sec. 53 for the portion of the section relating to the formation of corporations of the first class.

stock thereof has been paid in cash to the treasurer of the intended corporation, and the name and residence of such treasurer shall be therein given. The same shall be acknowledged by at least three (two)[18] of the subscribers thereto, before the recorder of deeds of the county in which the chief operations are to be carried on, or in which the principal office is situated,[19] and they shall also make and subscribe an oath or affirmation before him, to be indorsed on the said certificate that the statements contained therein are true. The said certificate, accompanied with proof of publication of notice as hereinbefore provided, shall then be produced to the Governor of this Commonwealth, who shall examine the same, and if he find it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof and indorse his approval thereon, and direct letters patent to issue in the usual form, incorporating the subscribers and their associates and successors into a body politic and corporate, in deed and in law, by the name chosen, and the said certificate shall be recorded in the office of the Secretary of the Commonwealth, in a book to be by him kept for that purpose, and he shall forthwith furnish to the Auditor General an abstract therefrom, showing the name, location, amount of capital stock, and the name and address of the treasurer of such corporation. The said original certificate, with all its indorsements shall then be recorded in the office for the recording of deeds, in and for the county where the chief operations are to be carried on, and from thenceforth the subscribers thereto and their associates and successors, shall be a corporation for the purposes and upon the terms named in the said charter. Certified copies of both the records thereof and of the charters of the corporations named in the first class specified in the foregoing section shall be competent evidence for all purposes in the courts of this Commonwealth.

(18) See Note 16. Inasmuch as the Act of May 29, 1901, P. L., 326, requires but two subscribers, but two subscribers need acknowledge the certificate. People's Gas Lt. & Fuel Co., of Bucks County, Op. Atty. Gen., 28 Pa. C. C., 28 (1903).

(19) That from and after the passage hereof, all certificates of association or articles of incorporation may be acknowledged and sworn to before a notary public of the Commonwealth of Pennsylvania, in the same manner, and with like force and effect, as though acknowledged and sworn to before the recorder of deeds of the proper county. Act of April 15, 1891, P. L., 18.

The Secretary of the Commonwealth shall charge and receive a fee of five dollars upon every paper relating to a corporation filed or recorded in his office.

72. Forms of Certificates of Incorporation.

The State Department furnishes, upon application, blank forms of certificates to be used in the formation of the following classes of corporations:

Traction Companies,
Street Railway Companies.
Railroad Companies,
Natural Gas Companies,
Building and Loan Associations,
Coöperative Associations,
Water Companies,

And a blank to be used in the formation of any corporation, under the Act of April 29, 1874, and its supplements, except a building and loan association. These forms should be used in making all applications for charters. Forms of statements of purpose appropriate for the purposes of most corporations, to be used in connection with the last named blank, will be found in the chapters treating of the different classes of corporations, respectively.

73. Practice of the Office of the Secretary of the Commonwealth.

With reference to the practice of the office of the Secretary of the Commonwealth in the formation of corporations of the second class, it should be said that each Secretary is a law unto himself in this regard. There are innumerable decisions of the different Secretaries upon various matters of practice and construction of law. In fact, some of the Secretaries, or the subordinates who acted for them, have seemed to be affected with a veritable *cacoethes scribendi,* and have emitted long and learned opinions which were not binding on their successors nor even upon themselves. To reproduce or even to cite all these numerous opinions would be confusing and even misleading. The State Department is obliging and prompt in answering questions as to matters of practice, and applications for charters which do not meet with its requirements are returned with instructions as to how to make the same comply therewith. The contents of this chapter will or-

dinarily be sufficient for the needs of the practitioner. In unusual cases the instructions of the State Department should be asked for and followed.

74. Who May be Incorporators.

Under the Acts of May 29, 1901, P. L., 326, and April 23, 1903, P. L., 272, any three or more persons may form a corporation of the second class, as designated in the Act of April 29, 1874, and its supplements.[20]

The number of incorporators required for other classes of corporations will be found by reference to the chapters treating of such classes, respectively.

Married women may be incorporators of corporations of the second class, according to the opinion of one Attorney General,[21] and they may not, according to the opinion of another.[22]

An unincorporated association may not be a corporator,[23] and it is probable that a corporation may not.

A resident alien friend may be a stockholder in a Pennsylvania corporation and presumably an incorporator thereof.[24]

The requirements of the statute as to the number of corporators required to form a corporation are mandatory. The statutory number is indispensable, and the interest of each, however small, must be real.[25]

The residence of each incorporator must be set out in the application.

WHAT CERTIFICATES OF INCORPORATION MUST SET OUT.

75. Name of the Corporation.

Except in the case of coöperative associations and perhaps one

(20) See Sec. 50.

(21) Married Women Corporators, 18 Pa. C. C., 492 (1896).

(22) New Century Club's Application, 9 Pa. C. C., 355 (1891); Piso Co., 15 Pa. C. C., 348 (1894).

(23) Hall Assn., of Washington Camp, etc., 10 D. R., 621 (1901).

(24) See Com. *v.* Detwiler, 131 Pa., 614 (1890).

(25) Tillyer *v.* Hero Jar Co., 17 Phila., 153 (1885); 42 Leg. Int., 150; Appeal of Rowley, et al., 115 Pa., 150 (1886); 20 W. N. C., 280. In this case it was held that where a person is named in the articles of association as a corporator, and certified as such for the purpose of obtaining a charter, he cannot be deprived of his right as such by the others who have united in the certificate.

or two other special classes of corporations, the laws of Pennsylvania do not prescribe what the name of a corporation shall contain. In one case[26] it was held that the name should indicate the purpose of the charter, and an opinion of the Attorney General holds that when it is sought to change the name of a corporation the name proposed should indicate the character of the business to be conducted and not be simply the name of individuals in partnership form,[27] but corporations with such names are frequently incorporated, as an examination of the biennial lists of corporations formed under the Act of April 29, 1874, published by the Secretary of the Commonwealth, shows.

From an inspection of said lists it appears that the title of a corporation need not necessarily terminate with or include the word "company," but that it may end with "works," "incorporated," following the names of one or more individuals, or even such names without the word "incorporated," (See "George Brothers," inc'd., July 15, 1902), or the word "enterprises." The titles of corporations not for profit may, and frequently do, terminate with the word "association."

The practice has been to grant charters to corporations notwithstanding alleged conflicts of names unless the similarity of titles is such as to probably result in confusion in the imposition and collection of taxes, or uncertainty in judicial process,[28] and thus compel corporations whose names are so appropriated to go into court to enjoin the use of them. This practice often works great hardship. The State should protect a corporation in the rights granted to it, among which is the right to an exclusive use of its charter name, and the Commonwealth should not lend its assistance to persons desirous of appropriating to themselves the benefits arising from the use of a name made valuable by the labor and capital of oth-

(26) Charter Nether Providence Assn., 12 Pa. C. C. Rep., 666 (1893).

(27) Coal & Timber Pubg. Co., Op. Atty. Gen., 32 Pa. C. C. Rep., 250 (1906).

(28) Kidd Bros. & Burgher Steel Wire Co., Op. Sec. Com., 17 Pa. C. C., 238 (1895), where a charter was granted to said company against the protest of the Kidd Steel Wire Co., Lim. In this opinion it was stated that the State Department would not refuse to charter a corporation because its name was so like that of another company as to mislead the customers of the latter. This, however, has not been the practice of the department.

ers. Where it is evident that a court of equity would restrain the use of a name no charter to a corporation with such title should be granted.

Geographical and local names are, however, incapable of exclusive appropriation.[29]

Cases where charters have been refused on account of the resemblance of the names of proposed corporations to those of existing companies are cited in the note.[30]

(29) West End Companies, 27 Pa. C. C., 641 (1903); Quemahoning Valley Coal Co., 28 Pa. C. C., 669 (1903).

(30) A charter was granted to the York Wall Paper Company against the protest of the York Card and Paper Co. York Card and Paper Co. *v.* York Wall Paper Co., Op. Sec. Com., 15 Pa. C. C., 554 (1896); 4 D. R., 128; 35 W. N. C., 574.

A charter was refused to the Gas Company of Altoona on the protest of the Altoona Gas Co. Altoona Gas Co. *v.* Gas. Co. of Altoona. Op. Sec. Com. 5 D. R., 299 (1896); 17 Pa. C. C., 662.

Incorporation was granted to the North Fifth St. Mutual Land Assn., against the protest of the North Fifth St. Real Estate Co. North Fifth St. Mut. Land Assn., 8 Pa. C. C., 15 (1889).

The issue of a charter to the Carlin Manufacturing Company was opposed by Thomas Carlin's Sons, a partnership engaged in the same line of business, whose products were patented and stamped "Carlin's." Charter was granted on the ground that the only similarity consisted in the use of the family name "Carlin," to which the protestant had no exclusive right, especially as that was the name of a principal stockholder in the proposed corporation. Carlin Mfg. Co. Op. Sec. Com., 10 Pa. C. C., 667 (1891); 1 D. R., 14; 29 W. N. C., 158.

Held, in an application for permission to amend the name of the Citizens' Trust, Tax Indemnity and Surety Company, by striking out the words "Tax Indemnity," that the name as amended would not conflict with that of the City Trust, Safe Deposit and Security Co. Citizens' Trust, Tax Indemnity & Surety Co. Op. Sec. Com., 9 Pa. C. C., 366 (1891).

The Dime Savings Fund and Trust Company objected to the chartering of the Dime Savings Bank of Philadelphia. Charter approved. Dime Savings Bank. Op. Atty. Gen., 26 W. N. C., 77 (1890); 9 Pa. C. C., 369.

Application for a charter was made by the Bradley Fertilizer Company, of Philadelphia. The Bradley Fertilizer Co., a corporation of Massachusetts, doing business in the State, objected. Held, that it had a status as a protestant and charter was refused. Bradley Fertilizers' Co.'s Charter. Op. Sec. Com., 19 Pa. C. C., 271 (1897). Afterwards reversed, 19 Pa. C. C., 477 (1897); 6 D. R., 424, under pressure not wholly confined to legal argument.

76. The Place of Business.

The place where the business of a company is to be transacted is "the place where its corporate functions are to be performed, the place from which work is to be directed and not necessarily where the employes do their work." [31] Hence where an application for charter recited that the business of said corporation was to be transacted "in Pennsylvania, and elsewhere; principal office, Philadelphia," held, that the statement was not in compliance with the Act of 1874,[32] and the same ruling was made where the application recited that the business of the company was to be transacted "generally throughout the United States, and especially in the Territory of New Mexico." [33]

It does not necessarily follow that the office of a company is the place where its business is to be transacted, and hence a statement that "The place where the office is to be located is in the City of Philadelphia," is not sufficient.[34]

77. Statements of Purpose of Incorporation.[35]

Such powers as are incident to the charter privileges of every

The words "West End" being descriptive of a locality, may not be exclusively appropriated by a corporation in its title. Hence charters were granted to the West End Savings and Trust Co." and the "West End Trust Company" of Pittsburg, against the protests of each other and the protest of the "West End Savings Bank." West End Companies, 27 Pa. C. C., 641 (1903).

An application for a charter for the Pennsylvania Correspondence School to do business at Scranton, was refused on the protest of the Pennsylvania Correspondence Institute, doing business at the same place. Penna. Correspondence Schools, 28 Pa. C. C., 512 (1903).

A charter was refused to the Quemahoning Valley Coal Co. on the protest of the Quemahoning Coal Company, but granted on the amendment of the title so as to read "The Quemahoning Valley Mining Co." Quemahoning Valley Coal Co., 28 Pa. C. C., 669 (1903). See Loughman's Ap., 128 Pa., 1 (1889).

A charter was refused in the name of "Pittsburg No. 8 Coal Company" on the protest of the Pittsburg Coal Company, but permitted to issue if the title were amended to Pittsburg No. 8 *Vein* Coal Company. In re Pgh. No. 8 Coal Co., 16 D. R., 577 (1907).

(31) Mann Mining Co., Op. Atty. Gen., 2 Chest. Co., 90 (1877).

(32) Mann Mining Co. Op. Atty. Gen., 2 Chest. Co., 90 (1877).

(33) Jarilla Copper Co., 2 Chest. Co., 135 (1883).

(34) Enterprise Mut. Beneficial Assn., 10 Phila., 380 (1875).

(35) Statements of purposes proper for the use of various classes of corporations will be found in the chapters treating of such classes, respectively.

corporation or to the purposes enumerated in the application should not be set forth in the application.[36] An application will not be approved which contains unnecessary or irrelevant matter[37] but should be amended so as to eliminate whatever is superfluous.[38]

Applications for charter must not state a dual purpose. The following statements of purpose have been held to be dual or too general: The supply of ice to the public and the purchase and sale of coal;[39] the mining for and manufacture of oil and gas;[40] the mining and boring for gas and oil, and, further, of constructing and operating a pipe line under the right of eminent domain;[41] the manufacture of gas meters, machines and regulators, etc., and for the purpose of dealing in any kinds of goods, wares and merchandise at wholesale;[42] the maintenance of an elevator and the construction of a road;[43] the dealing in patent rights and building of railroads;[44] the purchase and sale of real estate, and the laying out and dividing it into streets, alleys and building lots, and dedicating or donating the same;[45] the manufacturing of gas for illuminating, heating and fuel and their by-products, and erecting, purchasing, leasing, improving and operating works for the manufacture of the same, the manufacturing, leasing, buying and selling all goods, materials, apparatus and appliances, with

(36) McClurg Gas Construction Co. Op. Atty. Gen., 16 Pa. C. C., 505 (1895).

(37) United Gas Company, Op. Attorney Gen., 1 Pa. C. C., 468 (1886); Opinion of the Attorney General, Feb. 26, 1875. Rep. Atty. Gen., 1895-6, 313.

(38) Glenwood Coal Co., Op. Atty. Gen. 6 Pa. C. C., 575 (1889); McClurg Gas Construction Co., Op. Atty. Gen. 16 Pa. C. C., 505 (1895).

(39) Butchers' Ice & Coal Co., Op. Atty. Gen. 2 Chest. Co., 184 (1874).

(40) Newton Hamilton Oil & Gas Co., Op. Atty. Gen., 10 Pa. C. C., 452 (1891).

(41) Washington Mining & Impt. Co., Op. Sec. Com., 9 Pa. C. C., 323 (1887).

(42) Charter Purposes. Op. Atty. Gen. 17 Pa. C. C., 577 (1896). Prior to the amendment of June 25, 1895, P. L., 295, permitting the formation of wholesale mercantile corporations, mercantile companies could not be formed under the Act of April 29, 1874. See Com. *v.* Lippincott Co., 156 Pa., 513 (1893); Com. *v.* Thackara Mfg. Co., 156 Pa., 510 (1893).

(43) Op. Atty. General. Rep. of Atty. General, 1895-6, 345.

(44) Opinion of Attorney General, March 14, 1878. Rep. Atty. Gen., 1895-6, 352.

(45) North Fifth Street Mut. Land Assn., 8 Pa. C. C., 15-17 (1889).

the right to acquire and hold patent rights, etc;[46] the drilling, boring, digging and mining minerals, oils and gas and preparing, transporting and selling the same;[47] the mining coal and the manufacture of coke, the excavation and production of minerals and the sale of the same in crude or manufactured form;[48] the mining of coal and manufacturing of coke, excavation and production of minerals in crude or manufactured forms, with power to acquire, mortgage and dispose of in fee simple or less estate, lands or mineral rights, etc.[49]

Two purposes may, however, be combined when they are embraced in one division of corporations of the second class and are of a kindred and cognate nature,[50] but all the different objects enumerated in Clause 18, Class 2, Sec. 2, may not be combined in the same statement.[51]

Rulings as to what purposes come or do not come within the meaning of the several clauses of Class 2, respectively, have been made as follows:

A laundry is engaged in a "mechanical business" within the meaning of Cl. 18, and may be incorporated thereunder;[52] and a dairy company[53] and a corporation organized for manufacturing all kinds of lumber and the sale of the same, the purchasing and selling of mills, etc.,[54] also come within the intent of said clause; but a company formed for the purpose of preparing and mechanically executing designs for the decorating and furnishing of buildings, including frescoing, painting, etc., was held not to contemplate the doing of a "mechanical business" within the meaning of said clause,[55] and the same was held in the case of a proposed company to be formed for dredging in and about rivers,

(46) McClurg Gas Construction Co. Op. Atty. Gen., 4 D. R., 349 (1895).

(47) Conewago Oil & Gas Co., Op. Atty. Gen., 6 Pa. C. C., 575 (1889).

(48) Glenwood Coal Co., Op. Atty. Gen., 6 Pa. C. C., 575 (1889).

(49) Sewickley Gas Coal Co., Op. Atty. Gen., 6 Pa. C. C., 575 (1889).

(50) Newton Hamilton Oil & Gas Co., Op. Atty. Gen., 10 Pa. C. C., 452 (1891). Glenwood Coal Co., Op. Atty Gen., 6 Pa. C. C., 575 (1889).

(51) Newton Hamilton Oil & Gas Co., Op. Atty. Gen., 10 Pa. C. C., 452 (1891).

(52) Keystone Laundry Co., 18 Pa. C. C., 444 (1896); 5 D. R., 735.

(53) Richboro Dairymen's Assn. *v.* Ryan, 2 Chest. Co., 541 (1885).

(54) Wagner *v.* Corcoran, 2 D. R., 440 (1892).

(55) Mechanical Business Cases, Op. Atty. Gen., 9 Pa. C. C., 1 (1890).

harbors and water courses, and executing all kinds of submarine work.[56]

Paving companies may be formed under Cl. 4, Class 2, as amended by the Act of May 24, 1887, P. L., 186.[57]

The Act of June 25, 1895, P. L., 295, amending Cl. 16, Class 2, so as to provide for the formation of wholesale mercantile companies does not authorize the formation of wholesale liquor companies[58] though such companies may now be formed under Cl. 18, Class 2, as amended by Act of July 9, 1901, P. L., 624, so as to authorize the incorporation of corporations for the transaction of any lawful business.

Statements of purpose in applications for charters should not include powers necessarily incident by law to a corporate existence or to the franchise claimed in a particular case. For example, an artificial gas company should not include in its statement of purpose "the right to erect, purchase, lease, improve and operate works for the manufacture of such gas," such right being incident to the right to manufacture gas.[59]

Such an artificial gas company may not claim as a purpose "the right to manufacture, lease, buy and sell goods, materials, apparatus and appliances" nor "the right to acquire and hold patent rights for inventions and designs relating thereto and receiving and granting licenses thereunder." A statement of purpose should not be an index to every right and privilege claimed under the charter.[60]

The requirements as to the setting forth of the territory within which water, gas and other companies possessed of the right of eminent domain intend to operate will be stated in the chapters dealing with such corporations, respectively.

78. The Payment of Ten Percentum of the Capital Stock.

The payment of ten per centum of the capital stock is a condition precedent to the grant of the charter, and where the same has

(56) Mechanical Business Cases, Op. Atty. Gen., 9 Pa. C. C., 1 (1890). In these cases it was held that "mechanical business" meant a business in which skilled labor was employed in shaping materials into structures or products of utility.

(57) Penna. Paving Co., 6 Pa. C. C., 122 (1888).

(58) Penna. Bottling & Supply Co., Op. Atty. Gen., 6 D. R., 530 (1877); 19 Pa. C. C., 593.

(59) McClurg Gas Construction Co., 16 Pa. C. C., 505 (1895).

(60) McClurg Gas Construction Co., 16 Pa. C. C., 505 (1895).

not been paid in, the corporation may be dissolved at the suit of the Commonwealth in an action of quo warranto.[61] The validity of the charter cannot, however, be questioned in a collateral proceeding upon the ground that the ten per centum was not paid in.[62] Each subscriber need not pay in ten per centum of his subscription, it being sufficient if that proportion of the whole capital stock has been paid.[63] The payment must be in cash, and where it was stated that payment had been made "in cash or its equivalent" the application was refused.[64] No charter will be granted unless the certificate expressly recites that the ten per centum of the capital stock has been paid to the treasurer in cash.[65]

An assignee for the benefit of creditors of an insolvent corporation has no standing to maintain an action against the incorporators because they falsely swore, in the certificate filed for the charter, that ten per centum of the capital stock had been actually paid in to the treasurer. The corporation was the gainer and not a loser by the fraud, and had, therefore, no action against the incorporators.[66]

Where a bill in equity alleged that credit had been given to a corporation by reason of the allegation contained in the certificate of incorporation that ten per centum of the capital stock amounting to a certain sum had been paid in, and asked that the unpaid balance of the ten per centum or so much as might be necessary be decreed to be paid in, held, that the persons making the certificate could not be held for the difference between the amount which they certified was paid in and what was actually paid, but that

(61) Com. *v.* Gray's Mineral Fountain Co., 20 Phila., 405 (1889); 46 Leg. Int., 118 (1889); 8 Dau. Co. Rep., 47. See Com. *v.* Pgh., Johnstown & E. R. R. Co., 9 Dau. Co. Rep., 190 (1906); 32 Pa. C. C., 401; Com. ex rel. Altoona & Phillipsburg Connecting R. R. Co., 32 Pa. C. C., 449 (1906).

(62) Hilliard et al. *v.* Wood Carving Co., 173 Pa. 1 (1896); Bair *v.* Jarboe, 44 Pitts. L. J., 340 (1897).

(63) Capital Stock, 2 Chest. Co., 185 (1876); Rep. Attorney General 1895-6, 325. See Garrett *v.* Dillsburg etc. R. R. Co., 78 Pa., 465 (1875), and Bucher *v.* Dillsburg and Mechanicsburg R. R. Co., 76 Pa. 306 (1874).

(64) Butchers' Ice & Coal Co., 2 Chest., 184 (1874) Ten per centum of the authorized capital must be paid in cash; property may not be taken in the payment of this amount. Hall Yarn & Waste Mfg. Co., 27 Pa. C. C., 668 (1903); 12 D. R., 548.

(65) Capital Stock, 2 Chest. Co., 185 (1876).

(66) Patterson, Assignee, *v.* Franklin et al., 176 Pa., 612 (1896); 38 W. N. C., 441. See Hooven Mercantile Co. *v.* Evans Mining Co., 193 Pa., 28 (1899).

they should be required to pay the full amount of their own subscriptions, the same being equal to the loss of the plaintiffs.[67]

Where cheques were given in payment of the ten per centum, and the same were subsequently returned to the stockholders drawing the same, by the directors, held, that the stockholders were liable, on the insolvency of the company, for the amount of their cheques, respectively, and that the directors who ordered the return of the cheques were liable jointly and severally for the amounts of the same not paid by the drawers.[68]

A stockholder who, as the secretary of a corporation had charge of its minute book and had full knowledge of the organization of the company, cannot, after a delay of a year and a half, and after the corporation has become insolvent, set up as ground for a claim against the officers of the company who sold him his stock that he was induced to buy it by false representations on their part, and that the company had been fraudulently organized inasmuch as the ten per centum in cash required by law had not been paid in.[69]

A foreign corporation becoming domestic under the Act of June 9, 1881, must show by its certificate that ten per centum of its capital stock has been paid in.[70]

Where a new corporation is formed by the purchasers of the property and franchises of an old corporation, the property may be put in as full paid stock, but ten per centum of the whole capital stock must be paid in cash to the treasurer. If, however, the purchasers reorganize and proceed under the charter of the old company the ten per centum need not be paid in.[71]

79. Amount of Capital Stock.

A charter will not be granted to a corporation where the amount of authorized capital stock is manifestly insufficient to carry out the charter purposes of the company.[72]

The certificate need not show that the entire authorized capital

(67) Bair & Gazzam *v.* Wilson, 15 Pa. Super Ct., 131 (1900).

(68) Schmidt *v.* Chester Shoe Mfg. Co., 25 Pa. C. C., 49 (1901).

(69) Hilliard et al. *v.* Allegheny Geom. Wood Carving Co., 173 Pa., 1 (1896).

(70) Foreign Corporations, Op. Sec. Com., 5 Pa. C. C., 231 (1888).

(71) Opinion of Lear, Atty. Gen., Attorney Gen.'s Rep., 1895-6, 338 (1877).

(72) Donora Light, Ht. & Pr. Co., 27 Pa. C. C., 463 (1903); Id. 522; See Hall Assn. of Washington Camp., 10 D. R. 621 (1901).

stock has been subscribed for, but it must show that at least ten per centum of such authorized capital has been subscribed.

80. The Names of the Directors.

The certificate must give the names of the directors chosen for the first year. A director need not be either a corporator or a subscriber to the stock of the company.[73] Salaried officers of corporations may be directors thereof.[74] Women may be directors.

81. Notice of Intention to Apply for Charter

Must be published for three weeks in two newspapers of general circulation in the "proper county." [75] By the words "proper county" is intended the county or counties within which the power and privileges conferred upon a corporation are authorized to be executed and must necessarily be used to carry out the purpose and object of its creation.[76] Twenty-one days must elapse between the first insertion of the advertisement and the last.[77]

The certificate having been subscribed by at least two subscribers, one of whom must be a citizen of Pennsylvania, and acknowledged before the recorder of deeds or a notary public, should be sent to the State Department at Harrisburg, accompanied by the necessary fees and the proper amount of bonus,[78] where it should remain on file during the period of publication. Proof of the publication of notice must be made in the shape of an affidavit of one of the corporators, accompanied by printed copies of the advertisement. A blank form for use in making this proof is furnished by the State Department on application.

82. Time for Filing Applications in the State Department.

The practice formerly was to require applications for charters to be filed and remain in the office of the Secretary of the Commonwealth during the period of publication, but this is not now always insisted upon and application for charter and proofs of

(73) Corporate Directors, 7 Pa. C. C., 178 (1880).

(74) Acts of May 14, 1891, P. L., 61, and May 20, 1891, P. L., 101. Prior to the passage of these acts it was held that a salaried officer might not be a director. Corporate Officers, 3 Pa. C. C., 188 (1887); Potter Gas Co., 15 Pa. C. C., 347 (1883).

(75) See Sec. 53.

(76) In re Chartiers Ferry Co., 2 Chest., 91 (1875).

(77) Shamokin Coal Gas Co., Atty. Gen.'s Rep., 1895-6, 304 (1874). For other rulings relative to publication of notice, see Sec. 62.

(78) For the fee bill of the Secretary of the Commonwealth, see Appendix. For Bonus, see Chapter on Taxation.

publication are not infrequently filed at the same time. While the former practice was in force the following rulings were made, which are, however, of little, if any, interest under the practice which now obtains.

Applications for charter may not be amended while on file in the State Department.[79] If the certificate filed is found to be not in proper form, it will be returned with a statement of its defects, and a new certificate conforming to the law and the requirements of the State Department should then be at once prepared, executed and forwarded for approval.[80] Applications for charter have, however, been permitted to be amended by the elimination therefrom of unauthorized statements.[81] Where an application was returned for amendment, and the original application was altered by striking out one word in the title of the proposed company and inserting another, after which the application was acknowledged anew, held that the application was in proper form.[82]

Re-advertisement of notice will not be required on the filing of a new certificate unless the change effected by the same is so great that the first publication does not cover the same.

83. Protests Against the Issue of Letters Patent.

Protests should be filed in the State Department as soon after the first publication of notice as possible. The protest should briefly set forth the ground of opposition, and the interest of the protestants. It must be specific, giving the full and correct name of the company against the application of which it is filed, and designating the date when the application is advertised to be made. A day for hearing will then be appointed, at which time all persons will be heard by counsel or in person.

In the hearing of protests, the State Department will not, as a rule, pass upon disputed questions of fact, but will leave the courts to pass thereupon.[83] The Department will not, for ex-

(79) Altoona Gas. Co. *v.* Gas Co. of Altoona, Op. Sec. Com., 17 Pa. C. C., 662 (1896).

(80) Amended Certificates of Incorporation, 9 Pa. C. C., 511 (1891).

(81) Suburban Gas Co. et al., Op. Sec. Com., 15 Pa. C. C., 126 (1895).

(82) Penn. Elec. Lt. Ht. & Pr. Co., 16 Pa. C. C., 502 (1895).

(83) I. Ritter & Sons' Ferry, 14 Pa. C. C., 10 (1894); Easton Transit Co., 13 Pa. C. C., 518 (1893); Union Water Co., 12 Pa. C. C., 61 (1892); Seneca Bridge Co., 11 Pa. C. C., 337 (1891); Fayette Fuel Gas Co., 11 Pa. C. C., 488 (1891); Bryn Mawr Water Co., 10 Pa. C. C., 670 (1891); 1 D. R., 89; Suburban Gas Co. et al., 15 Pa. C. C., 126 (1895); Citizens' Nat. Gas Co., Op. Atty. Gen., 9 Pa. C. C., 290 (1891).

ample, decide whether or not a water company with an exclusive franchise has forfeited the same;[84] whether certain territory sought to be covered by a proposed company is "adjacent territory" within the meaning of the provisions of the charter of another company;[85] whether the franchises of a protesting company ever vested,[86] or whether the business contemplated by the proposed corporation for the manufacture and sale of calcium carbide and its products would constitute an infringement of the exclusive franchises of an artificial gas company.[87]

Applications for charters will not be refused on the ground that the transaction of the business proposed is unnecessary, will not pay, will make the stock of the protestants worthless, etc.,[88] nor on the ground that the operations of the contemplated company may interfere with those of another company not having an exclusive franchise.[89] "When a Court of Common Pleas has extended the time within which a corporation shall complete its necessary buildings, etc., under the provisions of the Act of May 16, 1889, Sec. 2, P. L., 242, such corporation having the exclusive right to exercise its franchises in a certain territory, a charter will not be granted to another company to exercise the same franchises in the same territory."[90]

84. Power of Governor in the Granting of Charters.

The question whether the power of the Governor to grant charters is a ministerial or judicial power has been often raised, but has never been judicially determined.

(84) Union Water Co., 12 Pa. C. C., 61 (1892); Bryn Mawr Water Co., 10 Pa. C. C., 670 (1891).

(85) Granite Water Co., 12 Pa. C. C., 63 (1892); New Castle Water Co. *v.* West New Castle Water Co., 18 Pa. C. C., 498 (1896).

(86) Monongahela Water Co. *v.* South Side Water Co., 15 Pa. C. C., 603 (1895); 36 W. N. C., 55; 4 D. R., 158; 42 Pitts. L. J., 296; Suburban Gas Co., 15 Pa. C. C., 126 (1894); South Side Gas Co. *v.* Southern Illg. Co., 18 Pa. C. C., 529 (1886).

(87) Lebanon Gas Co. *v.* Lebanon Fuel Illg. & Pr. Co., 5 D. R., 529 (1896); 18 Pa. C. C., 223.

(88) Seneca Bridge Co. and Relief Bridge Co., 11 Pa. C. C., 337 (1892); 1 D. R., 416; 30 W. N. C., 200.

(89) Park Incline Plane Co., 1 D. R., 535 (1892); 11 Pa. C. C., 486. See also Monongahela Incline Plane Co. *v.* Grandview Incline Plane Co., 15 Pa. C. C., 568 (1895).

(90) Levis Water Company, 11 Pa. C. C., 178 (1892).

Sec. 3 of the Act of April 29, 1874, provides that the certificate of incorporation shall "then be produced to the Governor of this Commonwealth, who shall examine the same, and if he find it to be in proper form and within the purposes named in the second class, specified in the foregoing section, he shall approve thereof," etc.

It will be observed that this language differs from that of the same section conferring on law judges the power of granting charters to corporations of the first class. In the latter case the judges are to determine, before ordering and decreeing that a charter shall be approved, not only that the purpose of the corporation is within those named in the first class specified in Sec. 2, and that the certificate of incorporation is in proper form, but also that the purposes "appear lawful and not injurious to the community."

This language would seem to confer upon the judges of courts a wider discretion in the granting of charters to corporations of the first class than is given to the Governor in the granting of charters to corporations of the second class. At the same time it should be observed that the word "approve" as used in acts referring to the gubernatorial office implies a discretion on the part of the Governor.

This question is ably discussed by former Governor Pennypacker, in an opinion rendered in the case of Donora Light, Heat & Power Company, 27 Pa. C. C., 522 (1903), to which the learned reader is referred.

85. Recording Certificate of Incorporation.

The recording of the certificate of incorporation in the office of the recorder of deeds of the proper county is a condition precedent to corporate existence, and where such certificate is not so recorded, the corporators are individually liable for a debt due to one who dealt with them without knowledge of their incorporation,[91] nor, in such a case, can the company maintain an action on a stock subscription.[92]

(91) Guckert *v.* Haacke, 159 Pa., 303 (1893); 34 W. N. C., 41; 28 Atl. 249; N. Y. Exchange Bank *v.* Crowell, 177 Pa., 313 (1896); 39 W. N. C., 228. The corporate existence of a water company does not date from the issue of its letters patent but from the date of recording its charter in the county where its chief operations are carried on. Boro of Braddock *v.* Penn Water Co., 189 Pa., 379 (1899); Armstrong Water Co. *v.* Rayburn Water Co., 24 Pa. C. C., 13 (1900).

(92) York Flour Mill Co. *v.* Gallatin, 10 York, 183 (1897).

But corporators will not be held to be individually liable for the debts of the company because of slight errors in recording the certificate.[93] The failure to record the certificate of incorporation cannot be taken advantage of to impeach the charter collaterally. A traction company had not recorded its certificate. In an action against it and its lessor street railway company, it was sought to hold the stockholders liable as partners. Held, that it was sufficient that it was a *de facto* corporation, acting as such under letters patent.[94]

The Acts of April 28, 1899, P. L., 116, and of July 10, 1901, P. L., 651, provide that corporations which failed to record their certificates of incorporation may record the same and thus validate their acts done before such recording. These laws are not prospective in their provisions.

"When the Governor has approved the certificate and endorsed his approval thereon and directed letters patent to issue, and letters patent have been issued, a corporation *de facto* exists for all essential purposes and that the recording thereafter . . . . is directory; that the State might, perhaps, interfere and prevent the corporation from carrying on business until the articles of association and charter have been recorded . . . . but that third persons, dealing with the corporation as such, cannot be heard to claim in a collateral proceeding that the stockholders are individually liable. In case the plaintiff had trusted the defendants as partners, a very different question would have been presented." [95]

Companies organized after judicial sale, under the provisions of the Act of April 8, 1861, P. L., 259, get their letters patent under Act of May 15, 1876, P. L., 186, and are not subject to the provisions of the General Incorporation Act of April 29, 1874, and are not required to record their certificates of incorporation, as required by Sec. 3 of that Act.[96]

Where the articles of association of corporations formed under the Act of April 29, 1874, have been properly recorded in the office of the Recorder of Deeds of the proper county, it is unneces-

(93) Bendall *v.* Jackson, 11 Pa. C. C., 183 (1892).

(94) Pinkerton *v.* Penna. Traction Co., 193 Pa. 229 (1899). In this case the parties dealing with the company were aware of its corporate status.

(95) Pierce *v.* Hacke et al., 1 D. R.; 517 (1892). See W. H. B. & L. Assn. *v.* Morgenthal, 2 Pears, 343.

(96) Goodbread *v.* Tpk. Co., 13 Super. Ct., 82 (1900).

sary, when one or more such corporations merge and consolidate under the Act of May 29, 1901, P. L., 349, to record the certificate of merger of the new company.[96*]

86. Validation of Acts of Traction Companies Done Before Recording Their Charters.

Any corporation to which letters patent may have been issued under the Act of Assembly of the twenty-second day of March, Anno Domini, one thousand eight hundred and eighty-seven, whose original certificate with all of its endorsements has not been recorded in the office for recording deeds in and for the proper county, as required by the second section of the said Act of Assembly, may at any time within thirty days from the passage of this act have the said certificate recorded in the office for recording deeds in and for the proper county, and the recording of the same shall have the same effect as if it had been recorded immediately after letters patent were issued, and no act of the said corporation shall be deemed invalid or void by reason of the failure to so record the original certificate before it did any corporate act or thing.[97]

87. Validation of Acts Done by Corporations Formed Under the Act of April 29, 1874, Before Recording Their Charters.

Where, heretofore, any act has been done or transfer or conveyance of any property been made to or by any corporation created or intended to be created by virtue of the provisions of the Act of Assembly approved April twenty-ninth, one thousand eight hundred and seventy-four, or its supplements, in good faith, after the issuing of letters patent, and before the actual record of the certificate, such acts, transfers and conveyances shall, after said certificate has been duly recorded as provided in the said act, be deemed and taken to be valid and effectual for all purposes: *Provided,* This act shall not affect any proceeding now pending.[98]

(96*) Keller *v.* Riverton Consol. Water Co., 34 Pa. Super. Ct., 301 (1907).

(97) Act April 28, 1899, P. L., 116.

(98) Act July 10, 1901, P. L., 651.

CHAPTER V.

ORGANIZATION AFTER INCORPORATION.

88. Organization.
89. Acceptance of Charters.
90. Acceptance of the Constitution.
91. Acceptance of the Act of April 29, 1874.
92. Acceptance of the Constitution and Act of April 29, 1874, by Corporations Incorporated Before the Passage of Said Act.
93. First Meetings of Stockholders and Board of Directors.
94. Registration in the Office of the Auditor General.
95. Forfeiture of Charters for Non-user.

88. Organization.

"To organize is to furnish with organs. An organ is defined to be an instrument or medium by which an action is performed, or an object accomplished. The medium by or through which a corporation can alone act or accomplish an object for which it was created is the officers provided for in the law of its being. Hence it is organized when those officers have been appointed and taken upon themselves the burden of their offices; it is then furnished with organs; endowed with capacity for the functions of life . . . . and this is the sense in which the word 'organized' is used in statutes provided for the incorporation of companies for different purposes." [1]

Under the Revenue Act of June 1, 1889, P. L., 420, providing for the exemption from taxation of certain corporations organized exclusively for manufacturing purposes, the word "organized" refers to incorporation, and not to the exercise of its functions in business operations.[2]

After the issuing of letters patent to a corporation by the Governor, the company is sufficiently organized to enable it to take an estate in lands conveyed to it, even though no officers have been elected; their assent to it when elected will be presumed.[3]

The organization of a corporation by the election of officers

(1) Com. *v.* William Mann Co., 150 Pa., 64 (1892).
(2) Com. *v.* William Mann Co., 150 Pa., 64 (1892).
(3) Rathbone *v.* Tioga Nav. Co., 2 W. & S., 74 (1841).

is not necessary to be proven in an action by the company for the recovery of a subscription to stock.[4]

Mistakes in the organization of corporations cannot be made use of by individual members as a defense, when sued under the individual liability clause of the Act of April 7, 1849, and supplements.[5]

89. Acceptance of Charters.

The general rule of law is, that there must be an acceptance of its charter by a corporation before its corporate existence can be fully established, whether the company in question be formed under a special or a general law,[6] but it has been held in Pennsylvania where a corporation plaintiff proved the Act of Assembly under which it was formed, the certificate of the commissioners for receiving subscriptions, made in accordance with the provisions of the act, and the letters patent, that it was not necessary to prove organization under the charter to establish the corporate existence and the plaintiff's right to sue;[7] and it has also been held that where a law incorporating a company was enacted upon the application of the corporation, its acceptance is a necessary inference from the fact.[8] So, where a society takes all the steps to obtain a charter, duly applies for it and obtains a decree of incorporation, there is a presumption that the charter has been accepted by the society, even though no formal entry of such application be found upon the minutes.[9]

In no case is an express acceptance of its charter by a corporation necessary.

"It is never indispensable to show a written instrument or even a vote of acceptance. It may be inferred from the acts of the persons interested, as, for example, from the exercise of corporate powers under the act, the election of officers, the holding of meetings, the adoption of by-laws and other corporate acts....Where the members of a company have in combination pursued a uniform and harmonious course of conduct which is con-

(4) Grubb *v.* Mahoning Nav. Co., 14 Pa., 302 (1850).

(5) McHose & Co. *v.* Wheeler et al., 45 Pa., 32 (1863).

(6) Clark & Marshall's Private Corporations, Sec. 44, A.; Cook on Corporations, Sec. 2 A.

(7) Grubb *v.* Mahoning Navigation Co., 14 Pa., 302 (1850).

(8) Dorsey Harvester Revolving Rake Co. *v.* Marsh, Grier & Co., (U. S. C. C.) 9 Phila., 395 (1873); Rathbone *v.* Tioga Nav. Co., 2 W. & S., 79 (1841). See Com. ex rel. Claghorn *v.* Cullen, 13 Pa., 140 (1850).

(9) Hochreiter's Appeal, 93 Pa., 479 (1880); 8 W. N. C., 461.

sistent with no other hypothesis than an acceptance of the charter, the strongest inference of acceptance arises."[10]

"While, therefore, a charter granted to persons who have not solicited it is said to be in fieri until after acceptance, yet it is not indispensable to show a written instrument, or even a vote acceding to the grant, for, unless the charter expressly prohibit it, every formality may be presumed from a continual exercise of the corporate powers."[11]

Before a charter can be considered as accepted or binding on a religious society it must appear that the members thereof were notified of it, and that they duly met together to consult and deliberate upon it, and that they accepted it in their associated capacity. Carrying such a charter around among the members and privately securing their signatures, without any meeting or notice, does not constitute the consent of the society, nor bind any not parties to it.[12]

"Notwithstanding the objection, however, it seems to be agreed that a written acceptance, though not executed at a meeting, may be sufficient if signed by all the stockholders or parties in interest." [13]

As all corporations have been formed since the adoption of the Constitution of 1874, upon the application of the corporators, it is probable that their charters would be presumed to have been accepted, even without proof that they have proceeded under them, but possible annoyance may be saved by the passage of a resolution formally accepting a charter, especially in the case of an unincorporated association or society becoming incorporated, where there might be a question whether its proceedings after the issue of the charter were under the provisions thereof, or not.

90. Acceptance of the Constitution.

Although some acts passed since the adoption of the Constitution of 1874 and the Act of April 29, 1874, provide that their provisions shall not apply to any corporation which shall not accept the Constitution or the provisions of the Act of 1874, in the manner provided therein, it is evidently unnecessary for any corporation formed since the adoption of the Constitution to accept the same, or for any corporation formed under the provisions of the

(10) Mut. Fire Ins. Co. of Germantown *v.* Stokes, 9 Phila., 80; 29 Leg. Int., 100.

(11) Com. ex rel. Claghorn *v.* Cullen, 13 Pa., 133 (1850).

(12) Short *v.* Unangst, 3 W. & S., 45 (1841).

(13) Com. ex rel. Claghorn *v.* Cullen, 13 Pa., 133 (1850).

Act of April 29, 1874, or its supplements, to accept the provisions thereof.

The charters of private corporations which were granted prior to the adoption of the Constitution are not affected thereby, provided organization had been effected and business begun thereunder at the date of said adoption. The original contract remains unimpaired until a new contract is entered into with the State, by accepting the benefits of the Constitution.[14]

The Constitution must be accepted by a vote of the stockholders. The Act of May 22, 1878, P. L., 84, which permits private corporations, as a prerequisite to receiving aid from the State, to accept the Constitution by vote of their directors or trustees, applies only to charitable corporations having no stockholders vested with property rights.[15]

91. Acceptance of the Act of April 29, 1874.

Corporations accepting the provisions of the Act of April 29, 1874, are controlled entirely by the provisions of that act, and all powers, duties and rights conferred upon them by prior acts are non-operative.[19]

Corporations of the character of those included in Class 1 of Sec. 2 of the Act of April 29, 1874, formed prior to the passage of said act, may not accept the provisions thereof, but should apply to the Courts of Common Pleas for any powers which said act permits corporations of that class to have.[20]

92. Acceptance of the Constitution and Act of April 29, 1874, by Corporations Incorporated Before the Passage of Said Act.

. . . . Any corporation or corporations for any of the purposes named and covered by the provisions of this act, heretofore created by any special act or acts, or in existence under the provisions of any general law of this Commonwealth, shall be entitled to all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same,

(14) Hays *v.* Com., 82 Pa., 518 (1877); Williamsport P. Ry. Co. *v.* Wmsport., 120 Pa., 1 (1888); 45 Leg. Int., 306.

(15) Baker's Appeal, 109 Pa., 461 (1885).

(19) Wallace *v.* Lehigh Water Company, 1 Northampton Co. R., 117 (1887).

(20) Women's Christian Association, 2 Chest. Co., 79 (1876); Rep. Atty. Gen., 1895-6, p. 329.

upon filing in the office of the Secretary of the Commonwealth a certificate of a single corporation, or a joint certificate if two or more corporations, incorporated for and doing the same kind of business, under the seal or seals of said corporation or corporations, accepting the provisions of the Constitution and of this act, duly authorized by a meeting of stockholders called for that purpose; and upon such acceptance, and approval by the Governor, he shall issue letters patent to said corporation, or if two or more corporations, to said corporations as one corporation, under such name as shall be designated by said corporation or corporations in said single or joint certificate, together with the amount and capital, number of shares and par value thereof, as shall be designated by said corporation or corporations in said certificate: *Provided,* That where two or more corporations shall make a joint certificate as aforesaid, and letters patent shall be issued to said new corporation, said corporations shall thenceforth be deemed, held and taken to be merged and consolidated, and be subject to all the limitations and liabilities of this act.[21]

93. First Meetings of Stockholders and Board of Directors.

Within a reasonable time after the issuing of the letters patent both stockholders' and directors' meetings should be held. As the certificate of incorporation names the persons who shall serve as directors for the first year there is, apparently no necessity for electing such officers at the first meeting, unless it is desired to supersede those named in the articles of association, in which event others may be elected.[22]

The following forms of calls and minutes will indicate what should be done at the first stockholders' and directors' meetings of a corporation formed under the provisions of the Act of April 29, 1874:

(21) Sec. 6, Act April 17, 1876, P. L., 33, amending Sec. 26, Act April 29, 1874.

The Act of March 30, 1875, P. L., 37, provides the manner in which railroad and turnpike and plank road companies, incorporated prior to the adoption of the Constitution of 1874, and taking advantage of the provisions of the Act of May 15, 1874, P. L., 188, shall accept the provisions of said Constitution.

(22) Com. *v.* Helms et al., 26 W. N. C., 358 (1890); 8 Pa. C. C., 410.

CALL FOR FIRST MEETING OF THE STOCKHOLDERS OF THE ———— COMPANY.

We, the undersigned, being all the corporators and stockholders of the Company, do hereby call a meeting of the corporators and stockholders of the said company for the purpose of organization, and for the transaction of such other business as may properly be brought before the meeting, to be held at on the day of 190 , at o'clock, M.

MINUTES OF THE FIRST MEETING OF THE CORPORATORS AND STOCKHOLDERS OF THE COMPANY CALLED AND HELD AT ON THE DAY OF 190 , AT O'CLOCK, M., BY THE EXPRESS CONSENT IN WRITING OF ALL THE CORPORATORS AND STOCKHOLDERS.

The following persons, holders of the number of shares of stock set against their names, respectively, constituting a majority in interest of the stockholders, were present:

Name of stockholder.	Number of shares.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

On motion of Mr. , duly seconded, Mr. was elected Chairman of the meeting and Mr. Secretary thereof.

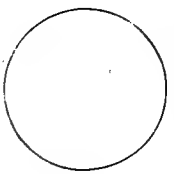
The Chairman announced that the corporation had been incorporated under the Corporation Act of 1874 and its Supplements; that Letters Patent had been issued to the company, and that the Articles of Association had been recorded in the Office of the Secretary of the Commonwealth, and in that of the Recorder of Deeds of County.

On motion of Mr. , duly seconded, the Secretary was directed to record and set forth in full upon the minutes of this meeting the said Articles of Association and Letters Patent.

(Articles of Association.)

(Letters Patent.)

On motion of Mr. , duly seconded, it was resolved that the said charter be accepted, and that this corporation do proceed to organize thereunder, which motion was unanimously adopted.



A form of seal the impress of which is affixed hereto having been submitted and considered, on motion of Mr. , duly seconded, it was unanimously resolved that the seal now submitted as and for the seal of this corporation be and the same is hereby adopted.

The following form of certificate of stock of the corporation having been submitted, on motion of Mr. , duly seconded, the said form was unanimously adopted.

(Insert Form of Certificate.)

The following by-laws were submitted and having been approved, section by section, on motion of Mr. , duly seconded, they were unanimously adopted as a whole.

(Insert By-Laws.)

(For Form of By-Laws, See Appendix.)

The minutes of the meeting were read and approved.
On motion, adjourned.

.....

Secretary Pro Tem.

CALL FOR THE FIRST MEETING OF THE DIRECTORS OF THE ———— COMPANY.

We, the undersigned, being all the directors of the Company, do hereby call a meeting of the board of directors, to be held at on the day of , 190 , at o'clock, M., for the purpose of electing officers and transacting such other business as may properly come before the board.

MINUTES OF A MEETING OF THE DIRECTORS OF THE ———— COMPANY DULY CALLED IN WRITING, SIGNED BY ALL THE DIRECTORS OF THE ———— COMPANY AND HELD PURSUANT TO SAID CALL AT ON THE DAY OF 190 , AT O'CLOCK, M.

Present: .....
.....
.....
.....
.....

Constituting all the directors of the company (or, constituting a majority and quorum of the board.)

Mr. having taken the chair, the proceedings of the meeting of the corporators and stockholders of the corporation held this day, were reported for the purpose of being noted on the minutes of the board.

Mr. having been nominated as President, and no other nominations having been made for that office, an election was duly proceeded with, and the said was unanimously elected President. Thereupon he took the chair and presided during the remainder of the meeting.

Mr. having been nominated as Secretary, and no other nominations having been made for that office, an election was duly proceeded with, and the said was unanimously elected Secretary.

Mr. having been nominated as Treasurer, and no other nominations having been made for that office, an election was duly proceeded with, and the said was unanimously elected Treasurer.

On motion of Mr. , duly seconded, it was unanimously:

Resolved, That the certificates of stock of the corporation be signed by the President, countersigned by the Treasurer and sealed with the common seal of the corporation, agreeably to the provisions of Sec. 1 of the Act of June 24, 1895, P. L., 258.

On motion of Mr. , duly seconded, it was unanimously:

Resolved, That the Treasurer give a bond in the sum of , with sureties for the faithful performance of his duties.

On motion of Mr. , duly seconded, it was unanimously resolved that the compensation of the Treasurer shall be fixed at the sum of dollars per annum, and that of the Secretary at dollars per annum.

The minutes of the meeting were read and approved.

On motion, adjourned.

.....

Secretary.

At first meetings of stockholders the directors are frequently authorized to purchase property for stock, or otherwise, in which case the stockholders and directors take the necessary action at their first meetings, at which, also, calls for the payment of certain amounts on account of stock subscriptions by resolution are sometimes made. Forms for use in such cases will be found in the Appendix.

94. Registration in the Office of the Auditor General.

Hereafter no limited partnership, bank, joint stock association, association, corporation or company whatsoever, formed, erected, incorporated or organized by or under any law of this Commonwealth, general or special, or formed, erected, incorporated or organized under the laws of any other State, and doing business in this Commonwealth, shall go into operation, without first having the name of the institution or company, the date of incorporation or organization, the Act of Assembly or authority under which formed, incorporated or organized, the place of business, the post office address, the names of the president, chairman, secretary and treasurer or cashier, and the amount of capital authorized by its charter, and the amount of capital paid into the treasury, registered in the office of the Auditor General; and every limited partnership, bank, association, joint stock association, company or corporation whatsoever, now engaged in business in this Commonwealth shall within ninety days after the passage of this act register as herein required in the office of the Auditor General; all the corporations, companies, associations and limited partnerships aforesaid shall annually hereafter notify the Auditor General of any change in their officers; and any such institution or company which shall neglect or refuse to comply with the provisions of this section shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an ac-

count settled by the Auditor General and State Treasurer in the same manner as taxes on capital stock are settled and collected.[23]

The direction of the Act of June 1, 1889, P. L., 420, as to registration is merely directory, and concerns the payment of State taxes only. It does not mean that the companies may not go into operation until they register, but only designates the time when they shall register, and, if they do not do so in the time specified, they become liable to the penalty provided in the act. Their acts prior to registration are not invalidated by the act.[24]

Although the language of Sec. 19 of the Act of June 1, 1889, supra, is broad enough to cover all corporations whatever, yet only corporations which are the subject of taxation for State purposes are required to register in the Auditor General's office. There is a dictum in St. Luke's M. E. Church case, 17 Phila., 261 (1884) that corporations not subject to State taxation must register, but that is not the practice.

Registration is required to be made upon a blank furnished by the Auditor General's Department, and a copy of such blank is inclosed to the corporation with its letters patent, by the Secretary of the Commonwealth.

Foreign corporations are required to register equally with domestic ones, but the registration of such foreign corporations should set out, in addition to the items enumerated in the Act of 1889, the amount of capital invested by the company in this Commonwealth.

95. Forfeiture of Charters for Non-user.

If any company incorporated under this act, or any of its supplements, shall not proceed in good faith to carry on its work and construct or acquire its necessary buildings, structures, property or improvements within the space of two years from the date of its letters patent, and shall not within the space of five years thereafter complete the same, the rights and privileges thereby granted to said corporation shall revert to the Commonwealth: *Provided, however,* That it shall be lawful for any such corpora-

(23) Sec. 19, Act June 1, 1889, P. L., 420. Prior provisions of the same general tenor are as follows: Sec. 1, Act April 21, 1858, P. L., 419; Sec. 1, Act May 1, 1868, P. L., 108; Sec. 1, Act April 24, 1874, P. L., 68; Sec. 26, Act April 29, 1874, P. L., 83; Sec. 1, Act June 7, 1879, P. L., 112.

(24) Pitts., Va. & Charleston Ry. Co. *v.* Pitts., C. & State Line R. Co., 159 Pa., 331 (1893).

tion who shall have proceeded in good faith as aforesaid at any time before the expiration of the said period of five years, or of any extension thereof, to apply to the Court of Common Pleas in and for the county in which said corporation shall have its principal office for an extension of such time as herein provided. Such application shall be made upon a petition, under the common seal of such corporation and verified by its president or other presiding officer, setting out the grounds of the application, and that the same is made pursuant to a resolution of the board of directors of said company at a meeting called for that purpose, a duly certified copy of which resolution shall be annexed to said petition. Thereupon it shall be the duty of such court to set down said petition for hearing before it upon some day to be fixed by said court, and to direct that notice of such petition shall be given by publication or otherwise as the court shall direct. Upon the day so fixed, or upon such subsequent day or days as the matter may be adjourned to, said court shall proceed to a hearing of said petition, and it being made to appear to said court that the order of notice herein provided for has been complied with, said court may, by order, adjudge and direct that the time of such corporation to complete its necessary buildings, structures, property or improvements shall be extended for a period not exceeding five years beyond the time fixed by law for the completion thereof, and thereupon upon filing a duly certified copy of such order in the office of the Secretary of the Commonwealth, the time of such corporation to complete its necessary buildings, structures, property or improvements shall be extended as provided in such order: *Provided further,* That when said buildings, structures, property or improvements are wholly within one county, said application shall be made to the Court of Common Pleas in and for said county.[25]

Any corporation of the second class, created under the provisions of the act to which this is a supplement, or any of its supplements, that shall not, within two years from the date of its letters patent proceed in good faith to organize and to do the things contemplated by its charter, and have paid up at least one-fourth of its capital stock, shall be held and deemed to have forfeited its charter, and the Attorney General shall, on the applica-

(25) Sec. 2, Act May 16, 1889, P. L., 242, amending Sec. 11, Act of April 17, 1876, P. L., 37.

tion of any citizen, take the proper legal steps to forfeit and vacate its said charter, but any corporation now in existence shall have two years from the date of this act to do and perform the things by this section required.[26]

The above Act of 1883 contemplates action by the Attorney General before the charter is declared forfeited, but under the 11th section of the Act of April 17, 1876, it was held that a corporation formed under the Act of April 29, 1874, which fails to carry on its work and construct the necessary buildings within two years from the date of the letters patent forfeits its charter without any judicial action. "The provisions of said Sec. 11 are a part of the charter, and hence the general rule of law that a corporation is not to be deemed dissolved by non-user of its franchises, does not apply."[27]

In a later decision, however, the Supreme Court said: "We also fully agree with the learned court below that no charter of a corporation for public purposes can be forfeited except by the Commonwealth in a proceeding for that direct purpose."[28]

The act of June 13, 1883, supra, extending for two years the time within which an existing corporation may avail itself of its franchises to prevent forfeiture, does not apply to a company which had at the date of the passage of said act lost its rights and privileges by a failure to comply within two years with the requirements of Sec. 1, of the Act of April 17, 1876.[29]

The acts of April 17, 1876, June 13, 1883, and May 16, 1889, apply only to corporations formed under the Act of April 29, 1874, but non-user is a ground, even in the absence of any special enactment, for the forfeiture of the charter of any corporation, in a proceeding by quo warranto by the Attorney General on behalf of the Commonwealth.[30]

(26) Sec. 5, Act June 13, 1883, P. L., 123.

(27) Com. *v.* Lykens Water Co., 110 Pa., 391 (1885). See Clincleclamouche Lumber & Boom Co. *v.* Com., 100 Pa., 438 (1882); 12 W. N. C., 357.

(28) Hinchman *v.* Phila. & W. Chester Tpk. Co., 160 Pa., 150 (1894). See Com. *v.* Allegheny Bridge Co., 20 Pa., 185 (1852). Appeal of Phila. & Merion Ry. Co., 187 Pa., 123 (1893).

(29) Com. *v.* Lykens Water Co., 110 Pa., 391 (1885).

(30) Com. *v.* Hulings, 129 Pa. 317 (1889); Turnpike Co. *v.* Com., 1 Penny., 458; Western Pa. R. Co.'s Ap., 104 Pa., 399 (1882); Com. *v.* Commercial Bank of Pa., 28 Pa., 383 (1857); Clincleclamouche Lumber & B. Co. *v.* Com., 100 Pa., 438 (1882); 12 W. N. C., 357; Mumma *v.* Potomac

If a gas company, formed by the merger of other gas companies, proceeds in good faith, with a view to supplying all its territory, to carry on its work within the territory of any of its constituent companies, and constructs and acquires improvements for the common use of its entire territory within two years from the date of the letters patent of its constituent companies, the result is the same as if, prior to the merger each constituent company had proceeded in a similar manner on its own account, and avoids a forfeiture of the franchises of the constituent companies under Sec. 2 of the Act of May 16, 1889, P. L., 241.[31]

Co., 8 Peters (U. S.) 287. See Erie & N. E. R. Co. *v.* Casey, 26 Pa., 287 (1856).

(31) Chester County Gas Co. v. Merion & Radnor Gas & Elec. Co., 16 D. R., 214 (1906).

CHAPTER VI.

BY-LAWS.

96. Power to Adopt By-Laws.
97. By-Laws May Not be Repugnant to Charter.
98. Persons Dealing with a Corporation are Put on Notice as to Powers Granted by its By-Laws.
99. By-Laws Must be Reasonable.
100. By-Laws must be Pertinent to the Business of the Corporation Adopting Them.
101. Amendment of By-Laws.

96. Power to Adopt By-Laws.

The by-laws of every corporation created under the provisions of this statute, or accepting the same, shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the Constitution and laws of this Commonwealth and the Constitution of the United States. They shall be made by the stockholders or members of the corporation, at a general meeting called for that purpose, unless the charter prescribes another body, or a different mode. They shall prescribe the time and place of meeting of the corporation, the powers and duties of its officials, and such other matters as may be pertinent and necessary for the business to be transacted, and may contain penalties for the breach thereof, not exceeding twenty dollars. . . .[1]

Under the foregoing section a provision may, if it be deemed desirable, be inserted in the articles of association that the by-laws of the corporation shall be made and amended from time to time by the board of directors.

The power to make reasonable by-laws, consistent with its charter, and not inconsistent with law, and to alter, amend, suspend and repeal the same, providing that in the exercise of the latter power vested rights are not interfered with, inheres in every corporation. The power is to be exercised by those in whom it is vested by the charter; but if that instrument is silent on the subject, it resides in and is to be exercised by the corporation at large, that is, by the members in their constituent character, at a

(1) Sec. 5, Act April 29, 1874, P. L., 77, re-enacted by Act of May 14, 1891, P. L. 61.

general meeting of the corporation. A by-law which surrenders to the directors the exclusive power to alter or amend the by-laws is unreasonable, illegal and *ultra vires*.[2]

97. By-Laws May Not be Repugnant to Charter.

The by-laws must not be repugnant to the charter, the laws and Constitution of the State or those of the United States.[3] It has been held that it is within the powers of the congregation of a church to make a by-law vesting the appointment of inspectors of election in the president of the corporation and providing that no ballots shall be counted which contain anything more than the names of the candidates thereon,[4] or providing that no person shall vote who has not been a regular member of the church for a year preceding the election, or who is in arrears for pew rent for more than two years;[5] but where the charter provided that members who had paid pew rent for two successive years immediately preceding the election might vote, a by-law restricting the right to vote to persons entered on the church books at least six months before the election, and who are not in arrears for pew rent exceeding six months before the election, was held to be void.[6] Where a special act chartering a corporation gave its directors power to provide for the admission of members, a by-law adopted by the directors providing that every member ceasing to be a stockholder should cease to be a member was held invalid.[7] A by-law providing that less than a majority of the board of directors shall form a quorum is contrary to the

(2) Alters *v.* Journeymen Bricklayers' Protective Assn., 19 Pa. Super. Ct., 272 (1902). A by-law providing that "no alterations or amendments shall be made to the by-laws unless proposed in writing to the board of directors and adopted by a two-third vote of the members present" should not be construed as surrendering to the directors the exclusive power to alter or amend the by-laws, but rather as conferring upon them the right to first approve the proposed amendments, before they are submitted to the corporation. Ibid.

(3) German Gen. Benefic. Assn., 30 Pa. 155 (1858); Butchers' Benefic. Assn., 35 Pa., 151 (1860); Skandinaviska Brodroforeningen, 15 Pa. C. C., 516 (1893).

(4) Com. *v.* Woelper, 3 S. & R., 29 (1817).

(5) Com. *v.* Cain, 5 S. & R., 510 (1820).

(6) Raynor *v.* Beatty, 14 Phila., 80 (1880); 37 Leg. Int., 298.

(7) Phila. Sav. Inst., 1 Whart., 461 (1836); See Com. *v.* Gill, 3 Whart., 228 (1838).

provisions of the Act of April 29, 1874, and its supplements and is void.[8]

Where the charter vests the power to make by-laws in the corporation as a body, alterations made in said by-laws by the directors are illegal,[9] and where the power to make by-laws is in the directors, they may amend any by-law adopted by the stockholders.[10] Where the charter of a beneficial association states its purpose to be the aiding of widows and orphans of deceased members, and the constitution or by-laws direct the benefit fund to be paid to such person or persons as the insured may designate, there is a direct conflict between the charter and the by-laws, and the former must prevail.[11]

But while the by-laws should ordinarily be consistent with the articles of association, where the latter are inconsistent in some respects with the statutory provisions regulating the same matter, the corporation may pass a valid by-law in conflict with said articles, but in harmony with the statutory provisions.[12]

98. Persons Dealing With a Corporation Are Put Upon Notice As to Powers Granted by Its By-Laws.

The by-laws of a corporation are an essential part of its charter, and parties dealing with an officer of such corporation are put upon notice as to the extent of the officer's authority to bind the corporation.[13] By Sec. 5 of the Act of April 29, 1874, the by-laws of a corporation become written into the charter, and not only define and limit the rights, duties and powers of the officers, *inter sese,* but, so far as those with whom the corporation has dealings are concerned, puts such parties upon notice in treating with such officers, as to the extent of their power and agency, whether the specific by-law has been brought home to them, or not.[14] A corporation may, however, by acquiescing in a method

(8) Curry *v.* Claysville Cemetery Assn., 5 Pa. Super. Ct., 289 (1897); 40 W. N. C., 536.

(9) United Fire Assn. *v.* Bensman, 4 W. N. C., 1 (1877).

(10) Granger's Suggestion, 7 Phila., 350 (1870); Leg. Int., 125.

(11) Manalee *v.* Kts. of Birmingham, 2 Pa. C. C., 339 (1886).

(12) Appeal of Booz et al., 109 Pa., 592 (1885); 16 W. N. C., 365.

(13) Harvey *v.* Schuylkill R. E., T. & T. Co., 24 Pa. C. C., 593 (1900); 199 Pa. 421 (1901).

(14) Milward-Cliff Cracker Co.'s Est., 161 Pa., 157 (1895); Worthington *v.* Schuylkill Elec. Ry. Co., 10 Pa. Super. Ct., 117; 195 Pa., 211 (1900).

of transacting business different from that provided in its by-laws, be bound thereby.[15]

In an action against a corporation to hold it liable on a promissory note endorsed by its president, binding instructions should be given for the defendant, where it appears that the president had no authority under the by-laws to make the endorsement, that the corporation received no benefit from it, and that there was no course of dealing between the parties which misled the plaintiff.[16] But where a cheque is drawn by the treasurer of a corporation, without formal order of the directors, as required by the by-laws, and endorsed by the president, it is good in the hands of a person ignorant of the by-laws, when it appears that the president had deposited to the company's account, out of his own funds, sufficient money to meet the cheque, which money the company had appropriated to its own uses.[17] And where a shareholder in a beneficial association gave her cheque to the treasurer, which he embezzled, the by-laws requiring that dues should be paid only at regular meetings of the directors, it was held that the payment was a valid one,[18] the cheque having been made payable to the order of the association and having been endorsed by the treasurer who was the proper officer to do the same.

A by-law regularly adopted in conflict with the terms of a contract between the parties ante-dating the charter and the adoption of the by-laws regarding officers, management, etc., of the corporation, supersedes such agreement unless the same is clearly and particularly preserved by contemporaneous or subsequent action of the authorities adopting the by-law.[18*]

A member of an incorporated association becoming such after the adoption of the by-laws is presumed to know what they are and is estopped from denying their validity.[18**]

(15) Loucheim *v.* Somerset B. & L. Assn., 211 Pa., 499 (1905); reversing Same *v.* Same, 25 Pa. Super. Ct., 325 (1904).

(16) Worthington *v.* Schuylkill Elec. Ry. Co., 195 Pa., 211 (1900).

(17) Wayne Title & Trust Co. *v.* Schuylkill Elec. Ry. Co., 191 Pa., 90 (1899).

(18) Strong *v.* Ten Cent Tutor B. & L. Assn., 189 Pa., 406 (1899).

(18*) Coe *v.* Leckone Coke Co., 30 Pa. C. C., 113 (1904).

(18**) Penna. Milk Producers' Assn. *v.* First Nat. Bank of Honeybrook, 20 Pa. C. C., 540 (1898).

99. By-Laws Must be Reasonable.

By-laws must be reasonable in their provisions. Whether a by-law is reasonable or not is a question for the court, solely. But its unreasonableness should be demonstrably shown. Courts in construing by-laws will interpret them reasonably, if possible, not scrutinizing their terms for the purpose of making them void, nor holding them invalid because every particular reason for them does not appear.[19]

A by-law of a hall association providing that only members of lodges occupying and paying rent for the building shall be eligible as trustees, is not unreasonable.[20]

By-laws providing as follows have been held to be reasonable: That no stockholder may transfer his stock while indebted to the corporation;[21] that a majority of the board of directors of a club may suspend a member for acts which they may deem disorderly or injurious to the interests of the club, with an appeal to the society, when, unless the sentence is reversed, the member is expelled;[22] that a savings bank will not be responsible for money drawn on the presentation of a deposit book by another than its owner unless the depositor shall have previously given notice of the loss of the book;[23] that no change in the name of a beneficiary of a certificate in a beneficial association shall be made except upon petition to the society;[24] making the surveyor of a mutual fire insurance company the agent of the insured;[25] requiring the first bookkeeper to give a bond, the charter authorizing the company to take a bond from its cashier, but being silent upon the subject of a bond from such bookkeeper;[26] allowing a vote by proxy at all meetings when a stock vote has been ordered, the charter permitting the stockholders to vote by proxy at elections of members of the board of directors, and authorizing the directors to pass such by-laws as may be deemed expedient to the well being of the corporation.[27]

(19) Hibernia Fire Co. *v.* Com., 93 Pa., 264 (1880); 8 W. N. C., 320.
(20) Com. *v.* Amer. Prot. Hall Library Assn., 4 Walker, 163 (1881).
(21) Morgan *v.* Bank of North America, 8 S. & R., 73 (1822).
(22) Com. *v.* Union League, 135 Pa., 301 (1890).
(23) Burrill *v.* Dollar Savings Bank, 92 Pa., 134 (1879).
(24) Haigh *v.* Mentor Council, 17 Phila., 71 (1885).
(25) Susquehanna Ins. Co. *v.* Perrine, 7 W. & S., 348 (1844).
(26) Bank of Northern Liberties *v.* Cresson, 12 S. & R., 306 (1825).
(27) Wilson et al. *v.* American Acad. of Music, 43 Leg. Int., 86 (1886); 2 Pa. C. C., 280.

A by-law raising the monthly dues payable by the members of an incorporated volunteer fire company from twelve and one-half cents to two dollars, there being no ostensible reason for the increase, was held unreasonable and void.[28] A by-law placing unreasonable restrictions upon the transfer of shares of stock has been held invalid,[29] and it has been held, generally, that by-laws vesting in a majority the power of expulsion for minor offenses are invalid.[30]

100. By-Laws Must be Pertinent to the Business of the Corporation Adopting Them.

By-laws must be pertinent to the business which the company is formed to carry on. A by-law providing that each contributing member of a local council of the Junior Order of United American Mechanics shall be assessed ten cents additional every three months for the use of the American Defense Association is *ultra vires*.[31]

101. Amendment of By-Laws.

A rule of a corporation providing that the by-laws might be amended with the written consent of the owners of three-fifths in number of the shares of the company, given in writing, filed with the secretary and recorded in the minutes of the proceedings, is not complied with by a vote of three-fifths of the shares cast by ballot at an annual meeting of the stockholders in favor of an amendment, without previous notice of the proposed change.[32]

An association can enact alterations in the by-laws, of a mere regulative kind, or which are not inconsistent with the fundamental scheme of the incorporation, but in the line of its original purpose, conducive to perfect equality of benefits and burdens, though they affect (without destroying) vested rights, so long as the alterations relate to the duties and rights springing from the contract of membership, and not from other purely contract re-

(28) Hibernia Fire Engine Co. *v.* Com., 93 Pa., 264 (1880).

(29) Bank of Kentucky *v.* Schuylkill Bank, 1 Pars., 180 (1846).

(30) Evans *v.* Phila. Club. 50 Pa., 107 (1865). For discussion of the subject of by-laws relative to expulsion or amotion of members, see Chapter on Membership in Corporations.

(31) Crumpton *v.* Pittsburg Council, No. 117, Jr. O. U. A. M., 1 Pa. Super. Ct., 613 (1896); 38 W. N. C., 335.

(32) Bagley *v.* Reno Oil Co., 201 Pa. 78 (1902).

lations; because, on all questions of the rights and duties incident to membership every member, by his fundamental contract of membership, pledges his assent in advance to every lawful rule adopted by the majority in furtherance of the common objects.[33]

A member of a voluntary association of pilots became disabled from pursuing his calling at a time when the by-laws of the association provided that members disabled as he was should receive half-pay until reinstated, and was accorded half-pay. Subsequently the by-laws were changed so as to provide that members similarly situated should receive fifty dollars per month. Held, that the rights of the member had become fixed prior to the change of by-laws and could not be affected by any change thereof without his consent.[34]

A by-law of a creamery association providing for the forfeiture of stock if a holder does not supply milk to the creamery, cannot be enforced against a stockholder owning stock before the by-law was passed, who never assented to its passage.[35] A change in the by-laws of a corporation increasing the number of its directors cannot be made at a regular or annual meeting of the stockholders unless notice has previously been given of the change contemplated.[36]

(33) 7 Thomp. Corp., Sec. 8769.

(34) Marshall *v.* Pilots' Assn., 206 Pa., 182 (1903), reversing 18 Pa., Super Ct., 644 (1902). See March *v.* Fairmount Creamery Assn., 32 Pa., Super. Ct., 517 (1907).

(35) March *v.* Fairmount Creamery Assn., 32 Pa., Super. Ct., 516 (1907).

(36) Bagley *v.* Reno Oil Co., 201 Pa., 78 (1902).

CHAPTER VII

AMENDMENTS TO AND RENEWAL OF CHARTERS.

102. Amendments to Charters of Corporations of the First Class.
103. Amendments to Charters of Corporations of the Second Class.
104. Notice of Intention to Apply for Amendments.
105. Certificate of Character of Amendment.
106. Objects of a Corporation not to be Changed by Amendment.
107. Change of Names of Corporations of the First Class.
108. Change of Names of Corporations of the Second Class, and other Corporations for Profit.
109. Decisions Relative to Changes of Names of Corporations.
110. Validation of Changes of Names of Corporations not for Profit.
111. Validation of Changes of Names of Corporations of all Classes.
112. Renewal of Charters.
113. Extension of Charters of Manufacturing Companies.

102. Amendments to Charters of Corporations of the First Class.[1]

As often as the corporations named in the first class, specified in the second section of the act to which this is a supplement, including all such corporations now in existence, and academies, colleges and universities, shall be desirous of improving, amending or altering the articles and conditions of their charters, it shall and may be lawful for such corporations, respectively, in like manner to specify the improvements, amendments or alterations which are or shall be desired, and exhibit the same to the Court of Common Pleas of the proper county in which said corporation is situated as aforesaid, where, if said court shall be of opinion such alterations are or will be lawful and beneficial, and do not conflict with the requirements of the statute to which this is a supplement or of the Constitution, it shall be the duty of said court to direct notice to be given, as provided in the third section of the act to which this is a supplement, of such application, and after decree made and such amendments are recorded the same shall be deemed and taken to be a part of the charter of

(1) For the amendment of charters of special classes of corporations see the chapters treating of such corporations, respectively.

the said corporation, and if any two or more such corporations shall desire to consolidate and merge with each other, or one or more within the other, upon application to the Court of Common Pleas of the county in which the corporation is situated, into which the one or more desire to merge or become consolidated with the same, proceedings shall take place as are required on an application to amend; and upon decree being made by said court, and the same being recorded in said county, upon the terms specified in said application, the said corporations, with all their rights, privileges, franchises, powers and liabilities, shall merge and be consolidated into, by the name, style and title given to the same in such decree, and upon the terms, limitations and with the powers stated and conferred in said application and decree.[2]

Where no notice is given that an amendment will be proposed for adoption at a given meeting, an amendment adopted at such meeting cannot be sustained.[3]

A petition for the amendment of a charter ought to contain all the facts necessary to enable the court to act understandingly. Nothing should be left to inference. The petition for the amendment of the charter of the Grand Lodge, A. O. U. W., so as to confer certain powers upon the "Supreme Lodge," did not set forth what the Supreme Lodge was, whether incorporated or not, domestic or foreign. Held, that the petition was insufficient.[4]

Proposed amendments to charters will not be approved unless they have first been ratified by the corporation,[5] in the manner prescribed by the charter or by-laws.[6]

The application must be made by the corporation as contra-distinguished from any number of members acting in their indi-

(2) Sec. 42, Act April 29, 1874, P. L., 106, as amended by Act of April 17, 1876, P. L., 37, Sec. 12. All after the first semi-colon is added by the said Act of 1876. The original section was modeled on Section 13, Act of October 13, 1840, P. L., 6, providing for the chartering of corporations by Courts of Common Pleas.

(3) African Methodist Episcopal Church Union, 28 Pa. Super. Ct., 193 (1905).

(4) Amendment to Charter of Grand Lodge, A. O. U. W., 17 W. N. C., 343 (1886); 43 Leg. Int., 261.

(5) Church of Holy Trinity, 2 Chest. Co., 249 (1884); Cressona S. F. & B. Assn., 1 Leg. Rec., 177 (1880).

(6) Mercantile Library Co., 2 Brewst., 447 (1868).

vidual capacities,[7] but it is sufficient, though not in the name of the corporation, if it be signed by the president and secretary, and have the corporate seal attached.[8]

An amendment contrary to public policy will not be granted,[9] nor one where the court is not satisfied that it will prove beneficial to the corporation,[10] nor will an amendment to the charter of a church be permitted altering its original principles, if a minority of the congregation object.[11]

The amendment of charters of corporations of the first class is committed to the discretion of the court to whom the application is made, and the Supreme Court will not review upon certiorari except when it appears from the record that such discretion has been improperly exercised, but any member likely to be affected by an amendment to a charter has standing to sue out a writ of certiorari, and revive the record for review.[12]

The only question reviewable in the Superior Court on an appeal from a decree of a Court of Common Pleas amending the charter of a church, is the regularity of the proceedings as brought up by the writ of certiorari.[13]

103. Amendments to Charters of Corporations of the Second Class.

When any corporation, formed for any of the purposes named in the second class of section two of the act to which this is a supplement, or embraced in that class by any of its supplements, and which shall have been or may hereafter be incorporated under the provisions of that act or its supplements, as also any corporation of the second class which has heretofore or may hereafter accept the provisions of said act and the several supplements thereto, and the Constitution of this Commonwealth in the manner provided by law, shall desire to improve, amend or alter the article and conditions of the charter or instrument upon which said corporation is formed and established, it shall

(7) Com. *v.* Church of St. Mary's, 6 S. & R., 498 (1821).
(8) Postley's Appeal, 26 Pitts. L. J., 63 (1878).
(9) German Evangelical Church, 6 D. R., 412 (1897).
(10) Church of Holy Trinity, 2 Chest. Co., 249 (1884).
(11) Hebron Church's Charter, 9 Phila., 609 (1871).
(12) Amendment to Charter Grand Lodge, A. O. U. W., 17 W. N. C., 343 (1886); 43 L. I., 261.
(13) African Methodist Episcopal Union Church, 28 Pa. Super. Ct., 193 (1905).

and may be lawful for such corporation to apply to the Governor of this Commonwealth for such improvement, amendment or alteration in the manner provided by this act.[14]

It has been held that a telephone company may not extend the territorial limits within which it is permitted by its charter to operate, by an amendment, but this decision was based on the ground that the enlargement or extension of territory is not necessarily implied in the words of the Act of June 13, 1883, "improvement, amendment or alteration." [15] In a later case it was held that the territorial limits of a water company might be extended by an amendment, the proviso in section three of said act: "That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company so as to interfere with or cover territory previously occupied by any other gas or water company," evidently implying that such corporations, at least, may extend their limits, if in so doing, they do not come within the inhibition of said proviso.[16]

A water company may not, however, extend its territory beyond the limits of a single municipality.[17]

In an opinion of the Attorney General advising against the granting of charters to certain companies whose objects were stated to be, *inter alia,* the mining of "minerals," it was said:

"The policy of the Corporation Act is, to require a specific statement of the purposes of the corporation. . . . . If, in the subsequent prosecution of the principal work of the corporation, there are incidentally discovered and produced other minerals there would be no difficulty in amending the charter so as to cover any profitable production and disposition of any such other mineral under the broad and liberal power of amendment conferred by the Corporation Act and its supplements, provided, of course, such amendment be confined to a purpose germane to the main and principal purpose for which the corporation was originally incorporated, and naturally connected therewith and incidental thereto. Indeed, I am strongly inclined to the opinion that in such case an amendment would not be necessary and that there is implied in the organization and incorporation of a mining company for the purpose of mining and producing any particular kind of minerals the power to produce and make available such other

(14) Sec. 1, Act June 13, 1883, P. L., 122.

(15) Penna. Telephone Co., 2 Chest. Co., 129 (1883); Rep. Atty. Gen., 1895-6, p. 393.

(16) Sayre Water Co., Op. Atty. Gen., March 21, 1884, Rep. Atty. Gen., 1895-6, p. 398.

(17) Monongahela Water Co., 9 Pa. C. C., 57 (1891).

minerals as may be discovered and developed in the course of the prosecution of the principal work of the corporation. . . . . At any rate, the power of amendment, as already suggested, would easily cover the production and profitable disposal of such material, if incidental or reasonably germane to the main purpose. If the original purpose should fail, through the absence of the minerals specifically described in the original certificate, at the place of the operation of such company, and some new and different minerals should be developed, all difficulty would be obviated and the case provided for by surrendering the old charter and applying for a new charter under the provisions of the Act of 1874 and its supplements, for the purpose of prosecuting the work of mining and developing the new and different mineral so discovered."[18]

A company incorporated to manufacture preserves, fruit syrups and condiments, to bottle mineral water, etc., was not permitted to amend its charter so as to allow it to add to its purposes the buying, selling and trading in vinous, spirituous and malt liquor, the latter purpose not being germane to those named in the charter.[19]

A general advertising business is a separate and distinct thing from a general printing and publishing business, hence a charter for the purpose of "printing and publishing a periodical known as Coal and Timber" cannot be amended by adding "and engaging in a general printing, advertising and publishing business."[20]

It would seem, generally, that no power can be gained by a corporation through the amendment of its charter which might not have been granted originally by its charter, had the conditions which subsequently developed existed at the time the same was granted. When charters were amended by special act, an acceptance of the amendment was held necessary which might, however, be presumed from the corporation whose charter was amended operating under said amendment.[21] Now that all amendments are granted at the direct request of the corporation, acceptance will probably be presumed even without proof that the company has proceeded under the amendment.

A coal mining company, incorporated for the term of twenty years to operate in a certain county, will not be permitted to

(18) Glenwood Coal Co., 6 Pa. C. C., 575 (1889).

(19) Penna. Bottling and Supply Co., 6 D. R., 530 (1897); Pa. C. C., 593.

(20) In re Coal and Timber Publishing Co., 15 D. R., 671 (1906).

(21) Fell v. McHenry, 42 Pa., 41 (1862); Mutual Fire Ins. Co. *v.* Stokes, 9 Phila., 80 (1872).

amend its charter so as to permit it to exist perpetually and to operate elsewhere than in said county.[22]

Where there are different classes of members of a corporation, a majority of each class must consent before the charter can be altered, if there be no provisions in the charter respecting alteration.[23]

Modifications and improvements in charters, useful to the public and beneficial to the companies, and in accordance with what was the understanding of the subscribers as to the real object to be effected, do not impair the contract of subscription. The issue of preferred stock, under authority of an act procured for the purpose, does not relieve a subscriber becoming such before the passage of such act from liability on his subscription.[24] But an alteration of a charter so extensive as to superadd to the original enterprise an entirely new undertaking will work an entire dissolution of the contract of subscription, where the subscriber has not assented to the change.[25]

A mining, mechanical, manufacturing or other corporation formed under the provisions of Par. 18, Sec. 2, Act of April 29, 1874, may, under Cl. 12 of Sec. 39 of that Act, provide in its charter that the power to sell or release the real estate shall be exercised by the directors, and where the charter does not contain such a provision it may be supplied by an amendment.[26] Otherwise in the case of corporations which are not empowered to insert such provisions in their charters in the first instance.[27]

Amendments to charters will not be rescinded by the courts granting the same because of improvident grants thereof,[28] or lack of power to grant the same,[29] where there has been unreasonable delay in applying for the revocation thereof.

Amendments may be granted for the improvement and clari-

(22) Victor Coal Co., 29 Pa. C. C., 209 (1903).

(23) St. Mary's Church, 7 S. & R., 517 (1822).

(24) Everhart *v.* Phila. & West Chester R. R. Co., 28 Pa., 339 (1857). See Irvin *v.* Turnpike Co., 2 Pen. & Watts, 466; Gray *v.* Monon. Nav. Co., 2 W. & S., 156; Clark *v.* Same, 10 Watts, 364.

(25) Everhart *v.* Phila. & W. Chester R. R. Co., 28 Pa., 339 (1857).

(26) Penna. Stave Co., 32 Pa. C. C., 347 (1906).

(27) Victor Coal Co., 29 Pa. C. C., 209 (1904); Duquesne Brewing Co., 29 Pa. C. C., 463 (1904).

(28) Blockley Tpk. Co.'s Petition, 140 Pa., 177 (1891).

(29) Com. *v.* Phila., Bala & Bryn Mawr Tpk. Co., 153 Pa., 47 (1893); 12 Pa. C. C., 275; 2 D. R. 10.

fication of charters, even where the powers asked for are already included in the charter rights of the companies applying for such amendments.[30]

104. Notice of Intention to Apply for Amendments.

The corporation desiring such improvement, amendment or alteration shall give notice of the intention to apply therefor, in two newspapers of general circulation, printed in the county wherein the principal office or place of business of said corporation is located, once a week for three weeks, setting forth briefly the character and objects of the desired improvements, amendments or alterations, and the intention to make application therefor.[31]

105. Certificate of Character of Amendment.

The said corporation shall prepare a certificate, under its corporate seal, setting forth the character and objects of the proposed improvement, amendment or alteration of their charter, or the instrument upon which the said corporation is formed or established; also, that all reports required by the Auditor General of the Commonwealth have been filed, and that all taxes due the Commonwealth of Pennsylvania have been paid; acknowledged by the president and secretary of said corporation and before the recorder of deeds of the county wherein such corporation has its principal office or place of business; which certificate, together with proof of publication notice, as provided in section two of the supplement to an act of which this is an amendment, shall then be produced to the Governor of the Commonwealth, who shall examine the same, and, if he find it to be in proper form, and that such improvements, amendments or alterations are or will be lawful and beneficial, and not injurious to the community, and are in accord with the purpose of the charter, and that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth of Pennsylvania have been paid, he shall approve thereof, and endorse his approval thereon, and direct letters patent to issue, in the usual form, reciting the said improvements, amendments or alterations; and the said certificate shall then be recorded in the

(30) In re Medico-Chi. College of Phila., 21 Pa. C. C., 157 (1898); 190 Pa., 121 (1899).

(31) Sec. 2, Act June 13, 1883, P. L., 122.

office of the Secretary of the Commonwealth, and, with all its endorsements, shall then be recorded in the office for the recording of deeds in and for the proper county, where the principal office or place of business of said corporation is located; and from thenceforth the same shall be deemed and taken to be a part of the charter or instrument upon which said corporation was formed or established, to all intents and purposes, as if the same had originally been made a part thereof: *Provided,* That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company, so as to interfere with or cover territory previously occupied by any other gas or water company.[32]

106. Objects of a Corporation Not to be Changed by Amendment Nor New Powers Acquired.

Nothing in this act contained shall be construed to repeal or authorize the repeal of any of the requirements or restrictions of the said Act of April twenty-ninth, one thousand eight hundred and seventy-four and its supplements, nor to dispense with any of the provisions of the said act, nor to authorize the right of eminent domain to be given to any corporation by amendment of its charter, nor to permit any change in the object and purposes of such corporation as shown by its original charter.[33]

107. Change of Names of Corporations of the First Class.

It shall be lawful for the several Courts of Common Pleas of this Commonwealth to change the name, style and title of any corporation within their respective counties with the same proceedings and in the same manner as they are now authorized to improve, amend or alter charters: Provided that no proceeding for such purpose shall be entertained by the courts until notice of such application is given to the Auditor General and proof of such fact is produced to the courts; and upon final decree in such proceeding, before using such name, the parties in interest shall file with the Auditor General a copy of the decree making such change.[34]

The third section of the act approved fourth April, one thousand eight hundred and forty-three, giving authority to courts of quarter ses-

(32) Act of March 31, 1905, P. L., 93, amending Sec. 3 of Act of June 13, 1883, P. L., 122.

(33) Sec. 4, Act June 13, 1883, P. L., 123. Prior Acts relative to the amendment of charters are as follows: April 6, 1791, Sec. 2, 3 Sm. Laws, 20; Oct. 13, 1840, Sec. 14, P. L., 6; May 8, 1854, Sec. 1, P. L., 674; May 7, 1855, P. L., 477.

(34) Sec. 1, Act April 20, 1869, P. L., 82.

sions to change the name, style and title of corporations be and the same is hereby repealed.[35]

The procedure for an amendment of charter provided for by law at the date of the passage of the Act of April 20, 1869, and which that act requires shall be followed in applications for changes of name, is, by Sec. 14, Act of October 13, 1840, P. L., 6, made the same as that required to be followed in applications for charter under the 13th section of said Act of 1840, which provides that the articles of association shall be exhibited and presented—

To the Court of Common Pleas of the proper county in which said corporation is intended to be situated or its principal business transacted; which said court is hereby required to peruse and examine said instrument, and if the articles, objects and conditions therein set forth and contained shall appear lawful and not injurious to the community, said court shall direct said writing to be filed in the office of the Prothonotary of said court, and also direct notice to be inserted in one newspaper printed in the proper county for at least three weeks, setting forth that an application has been made to said court to grant such charter of incorporation, and if no sufficient reason is shown to the contrary, it shall be lawful for the said court at the next term thereof to decree and declare by their order endorsed on said instrument . . that the persons so associated shall . . . . become and be a body corporate.[36]

Sec. 14 of the Act of October 13, 1840, P. L., 6, provided for the amendment of the charters of corporations formed under the provisions of Sec. 13 of said act, or under those of the Act of April 6, 1791. The Act of May 8, 1854, Sec. 1, P. L., 674, provided for the amendment of charters "granted by the Legislature for a purpose where authority to grant charters is or may be vested in the courts." The Act of May 7, 1855, P. L., 477, provided for amending proprietary charters and those granted by the General Assembly previous to the adoption of the Constitution of 1790, for a purpose where authority to grant charters is or may be vested in the court.

Sec. 3, Act of April 4, 1843, P. L., 132, provides that the several Courts of Quarter Sessions may change the corporate name, style and title of any corporation within their respective counties.

(35) Sec. 2, Act April 20, 1869, P. L., 83.

(36) This procedure differs from that required in the case of amendments to charters of corporations of the first class, by Sec. 42, Act April 29, 1874, in that publication is requisite in but one newspaper, instead of two, and in that the amendment may not be approved until the term following the application for the approval thereof.

Prior to the passage of the Act of April 4, 1843, there was no method by which a corporation formed by the Legislature for a purpose where authority to grant charters was not or might not be vested in the courts, could change its name by amendment of its charter. The Act of April 20, 1869, P. L., 82, repealed the said Act of April 4, 1843, and placed the power to change the names of all corporations in the Courts of Common Pleas, where the power to change the names of all other corporations than those formed by the Legislature for a purpose where authority to grant charters was not vested in the courts, already existed.[37]

"A general power to alter or amend a charter is a power to alter or amend any part of a charter, and necessarily includes the power to alter the name, which is a part of the charter." [38]

108. Change of Names of Corporations of the Second Class, and Other Corporations for Profit.

The Act of June 13, 1883, P. L., 122, authorizing corporations of the second class to amend or alter their charters by application to the Governor took from the Courts of Common Pleas the power to change the names of corporations of that class,[39] and the Act of 1869 was further superseded as to the change of name of insurance companies by the Act of May 1, 1876, P. L., 53, conferring upon the Commissioner of Insurance power to approve or reject proposed names.[40]

With the aforesaid exception of insurance companies, all corporations for profit now change their names under the provisions of the following act which supersedes in this respect the Act of June 18, 1883.

It shall be lawful for any corporation of this Commonwealth, heretofore or hereafter created by any general or special law, to change its corporate title by resolution of its board of directors, adopted by a two-thirds vote thereof, approved at any annual meeting, or special meeting duly called, of the stockholders by a two-thirds vote thereof. Upon such approval by the stockholders,

(37) See In re Fidelity Mutual Aid Assn., 12 W. N. C., 269 (1882).

(38) In re Fidelity Mutual Aid Assn., 12 W. N. C., 269 (1882).

(39) Fort Pitt B. & L. Assn. *v.* Model Plan B. & L. Assn., 159 Pa., 308 (1893); 33 W. N. C., 457; Wetherill Steel Casting Co., 5 Pa. C. C., 337 (1888); Excelsior Oil Co., 3 Pa. C. C., 184 (1887), overruling Martin Color & Chemical Co., 16 W. N. C., 510 (1882).

(40) Fidelity Mut. Aid Assn., 12 W. N. C., 269 (1882).

it shall be the duty of the president of said corporation to file in the office of the Secretary of the Commonwealth a certificate, under the seal of the company, setting forth the resolution adopted by the board of directors and approved by the stockholders, the date of the adoption of such resolution by the board of directors and the date of its approval by the stockholders, the date of the original incorporation of the company, the Act of Assembly under which the said corporation was created, the name under which the said corporation was originally incorporated and all subsequent changes therein, and the name which the corporation desires to adopt.

The Secretary of the Commonwealth shall examine the records in his office, and, if he find that the name desired by said corporation does not conflict with the name of any corporation appearing upon said records, he shall require the said certificate to be recorded and shall issue to the said corporation a certificate, under his hand and the seal of his office, granting to said corporation the use of said new corporate title. The Secretary of the Commonwealth shall, upon the issuing of any such certificate, require the same to be recorded in a book kept for that purpose, and certify the said change in the corporate title to the Auditor General of this Commonwealth: *Provided,* That any corporation, required to record the original certificate of incorporation in the office for the recording of deeds, shall, before being entitled to use the new corporate title, record in the office for the recording of deeds, where the original certificate of incorporation was recorded, the said certificate granted by the Secretary of the Commonwealth authorizing the use of the new corporate title: *Provided also,* That this act shall not apply to corporations not for profit.

All general or special acts inconsistent herewith be and the same are hereby repealed.[41]

109. Decisions Relative to Changes of Names of Corporations.

Notice must be given to the Auditor General, under the provisions of the Act of April 20, 1869, of an application to a Court of Common Pleas for the change of name of a corporation, whether such corporation be for profit or not for profit. The

(41) Act of April 22, 1903, P. L., 251.

provision for such notice is mandatory, not directory. The Act of 1869 is not repealed by the Act of April 29, 1874.[42]

A reason for a proposed change of name must be shown and where the reason given was the apparently very sufficient one that the change would probably enable the corporation to do more business, the petition therefor was refused.[43]

The Courts of Common Pleas may change the name of a corporation of the first class to that of another corporation of the same class, but such change will not divest the corporation whose name is taken of its property or charter rights.[44]

A decree changing the name of a corporation cannot be impeached collaterally.[45]

"While a corporation has, probably, no right to change its name without legislative authority—Regina *v.* Registrar, 10 Q. B., 839—we do not understand that by doing so and doing business under the new name, it either forfeits its franchises or the title to its property."[46]

Where a charter is sought to be amended by a change of corporate name and an enlargement of the corporate purpose, there must be separate papers: the one, under the Act of April 22, 1903, P. L., 251; the other, under the Act of June 13, 1883, P. L., 122, as amended by the Act of March 31, 1905, P. L., 93.[47]

A court of equity has jurisdiction to entertain a bill by a corporation to restrain by injunction another corporation from wrongfully using the plaintiff's name. When such a bill has been dismissed by the lower court on demurrer, the Supreme Court in reversing the decree may enter a decree finally disposing of the whole matter.[48]

The regularity of proceedings to change the name of a corporation may not be collaterally attacked in a suit to which the corporation is a party.[49]

(42) First Presbyterian Church, 107 Pa., 543 (1884); 15 W. N. C., 449; 111 Pa., 156 (1885).

(43) Bank of N. America, 2 Pa. C. C., 97 (1886).

(44) First Presbyterian Church, 111 Pa., 156 (1886).

(45) Freeland *v.* Penna. Central Ins. Co., 94 Pa., 504 (1880).

(46) Com. *v.* Penna. & Western R. R. Co., 41 Leg. Int., 448 (1884).

(47) In re Coal & Timber Pub. Co., 15 D. R., 671 (1906).

(48) Fort Pitt B. & L. Assn. *v.* Model Plan B. & L. Assn., 159 Pa., 308 (1893); 33 W. N. C., 457.

(49) International Savings & T. Co. *v.* Stenger, 31 Pa. Super. Ct., 294 (1906).

The petition of the Temple College, situate in Philadelphia, for a change of name to "The Philadelphia University and College for Industrious People," was refused on the protest of the University of Pennsylvania, it appearing that the latter institution was widely known and that letters were frequently addressed to it as the "University of Philadelphia." [50]

110. Validation of Changes of Names of Corporations Not for Profit.

Whereas, Certain corporations which are not conducted for profit, and are now mentioned in the first class named in section two of the Act of Assembly entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, and the supplements thereto, have heretofore applied to the several Courts of Common Pleas of various counties in this State for approval of changes in the names adopted by such corporations, without having first given notice of such application, in many instances, to the Auditor General of this Commonwealth, and, after said courts have made and entered decrees approving such changes, have omitted to file with the said Auditor General copies of such decrees, as required by the provisions of the Act of Assembly, entitled "An Act to enable the Courts of Common Pleas of this Commonwealth to change the name, style and title of corporations," approved the twentieth day of April, Anno Domini one thousand eight hundred and sixty-nine, therefore:

Sec. 1. Be it enacted, etc. That if any corporation, which was not at the time conducted for profit, and which is now mentioned in the first class named in section two of the Act of Assembly entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, and the supplements thereto, has heretofore applied to the Court of Common Pleas of the proper county in which the said corporation is situated for the approval of a change in the name adopted by said corporation, and has complied fully with the provisions of law now in force in this Commonwealth regarding the improvement, alteration and amendment of charters

(50) In re Temple College of Philadelphia, 15 D. R., 8 (1905).

of corporations of the class aforesaid, if the said court has made and entered a decree approving such change of name, said decree shall be held and taken to be as valid and as effectual in every respect as if said corporation had complied fully with the provisions of the Act of Assembly entitled "An Act to enable Courts of Common Pleas of this Commonwealth to change the name, style and title of corporations," approved the twentieth day of April, Anno Domini one thousand eight hundred and sixty-nine.[51]

It shall be lawful for the several Courts of Common Pleas of this Commonwealth to change the name, style and title of any corporation of the class named in the first section of this act, within their respective counties with the same proceedings and in the same manner as they are now authorized to improve, amend or alter charters of such corporations.[52]

111. Validation of Changes of Names of Corporations of All Classes.

Whenever any Court of Common Pleas of this Commonwealth, by a proceeding under and in pursuance of the Act of Assembly entitled "An Act to enable the Courts of Common Pleas of this Commonwealth to change the name, style and title of corporations," approved the twentieth day of April, Anno Domini one thousand eight hundred and sixty-nine, shall heretofore have made a decree changing the name of any corporation, such change of name shall be taken and held to be as valid and effectual in every respect as if made in accordance with the requirements of existing laws: *Provided, however,* That said corporation shall have complied with the provisions of said above recited Act of Assembly, by giving notice to the Auditor General of the application for such change of name, and before using the name as decreed by the court, filed with the Auditor General a copy of the decree making such change.[53]

(51) Sec. 1. Act May 2, 1899, P. L., 160. The office of the Auditor General is not one of record, and the filing of copies of decrees changing the names of corporations not subject to state taxes subserves no useful end whatever.

(52) Sec. 2, Act June 2, 1899, P. L., 160.

(53) Sec. 1, Act of April 4, 1901, P. L., 67. This act was passed to validate changes of names of corporations of the second class, decreed by Courts of Common Pleas since the passage of the Act of June 13, 1883, which vests the power to change the names of such corporations in the Governor.

112. Renewal of Charters.

Corporations created by or under the laws of this State, embraced within either of the classes named in section two of this act, the charters whereof are about to expire by lapse of time from their own limitation, may be rechartered, or the charters thereof renewed, under the provisions of this act, by preparing, having approved and recorded the certificate named in said section for the class of corporation of which the same is one. In addition to the requirements provided in this act for a new corporation, the certificate for a recharter shall state the fact that it is a renewal of the former charter, naming the corporation and the date of its first charter. It shall also be accompanied with a certificate, under the seal of the corporation, showing the consent of at least a majority in interest of such corporation to such recharter. It shall also state the financial condition of the said corporation at the date of such certificate, showing capital stock paid in, funded debt, floating debt, estimated value of property and cash assets, if any. It shall expressly accept the provisions of the Constitution of this State, and of this act, and expressly surrender all privileges conferred upon such corporation by its original charter that are not enjoyed by corporations of its class under this act or general laws of this Commonwealth. From the date of recording of such certificate, if the corporation be of the first class named in section two of this act, and from the date of letters patent if of the second class, the said re-chartered corporation shall be and exist as a new corporation under the provisions of this act and of its said renewed charter; and all of the rights, privileges, powers, immunities, lands, property and assets, of whatever kind or character the same may be, possessed and owned by the said original corporation, shall vest in and be owned and enjoyed by the said rechartered corporation, as fully and with like effect as if its original charter had not expired, save as herein and by said certificate expressly stated otherwise; and all suits, claims and demands by said corporations in existence at the date of such recharter, shall and may be sued, prosecuted and collected, under the laws governing the said corporation prior to its recharter, and all claims and demands of every nature and character in existence at said recharter, may be collected from and off the said rechartered corporation as fully and with like effect as if no change had taken place.[54]

(54) Sec. 40, Act April 29, 1874, P. L., 103.

Bonus must be paid on the recharter of a corporation,[55] and the same notice is required as in an original application.[56]

113. Extension of Charters of Manufacturing Companies.

The charters of all manufacturing corporations granted in accordance with the provisions of the present Constitution of this Commonwealth, and the Act of General Assembly entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and the charters of all manufacturing corporations that have accepted the provisions of the said Constitution and Act of Assembly, which charters were limited in their duration by the articles of association or by the act of Assembly under which they were granted, and have now expired or shall hereafter expire, are hereby extended for a period of twenty-five years from the date of the expiration of said charters: *Provided,* That a bona fide organization has taken place and business has been commenced in good faith within a period of two years from the date of the granting of said charters: *Provided further,* That manufacturing concerns availing themselves of the provisions of this act shall first pay into the treasury of this Commonwealth the fee and bonus upon their capital stock now fixed by law for the renewal or extension of a corporate charter: *And provided further,* That upon the payment of said fees and bonus and the production to the Secretary of the Commonwealth of evidence that the terms of this act have been complied with, letters patent shall issue to said manufacturing corporation.[57]

(55) Op. Atty. General, March 4, 1879, Atty Gen.'s Report, 1895-6, p. 369.

(56) Op. Atty. General, Report Atty. Gen., 1895-6, p. 321.

(57) Sec. 2, Act June 25, 1895, P. L., 310.

CHAPTER VIII.

BOOKS AND SEAL.

114. Corporation Books.
115. Inspection of Books of a Corporation by Stockholders.
116. Production of Books of Corporations.
117. Books of a Corporation as Evidence.
118. Sworn Copies of Books of Account of Transportation Companies Made Prima Facie Evidence.
119. Evidence from Bank Books.
120. Copy of Minutes of Corporation to be Prima Facie Evidence Relative to the Sale, Letting and Mortgaging of Corporate Real Estate.
121. Seal.

114. Corporation Books.

The laws of Pennsylvania do not prescribe what books shall be kept by corporations. The usual corporation books are the minute book, the stock certificate book, the transfer book and the stock book and stock ledger.

The minute book is the book wherein a record is kept of the proceedings had at the meetings of the stockholders and directors of the corporation. It is customary, also, to record the by-laws of the corporation in this book.

The stock certificate book consists of a number of certificates (See Sec. 321) varying in number according to the needs of the corporation, attached to stubs which are printed and ruled for the entry of data concerning the certificates severally attached to them.

Inasmuch as the assignments in the transfer ledger are merely supplementary to the original assignments on the back of cancelled certificates, the minute book and certificate book, only, may be sufficient for the purposes of a small corporation, although it is customary for even small corporations to keep a transfer book, which is a book containing blank assignments to be filled out as transfers are made, which assignments are usually signed by an officer of the company, or a transfer clerk, whose name is inserted in the blanks left for the name of an attorney in the original assignments on the back of the certificates.

The stock book and stock ledger, which are practically the same

thing, contain ledger accounts with the stockholders, showing the number of shares held by each, time when stock was acquired, amount paid thereon, from whom transferred, and certain other data.

The laws of some States require that the stock ledger and transfer books of corporations formed under their laws shall be kept within the limits of such States. There is no such law in Pennsylvania.

115. Inspection of Books of a Corporation by Stockholders.

"Every stockholder has a right, both by the Constitution and by statute and common law, to inspect and take a copy of the stock list of joint stock corporations for definite and proper purposes, but not for speculative purposes, nor the gratification of mere curiosity. Where stockholders desire a copy of the stock list for the purpose of consulting with and obtaining proxies from other stockholders to be used at a coming election of directors, such purposes are perfectly legal, and will justify the exercise of the right of inspection. It is unnecessary to make receivers parties to the proceedings. They have nothing to do with the stock and internal management of the company. Mandamus is the proper remedy." [1]

A, filed a petition for an alternative mandamus against a corporation and the directors thereof, alleging that he held a large amount of stock, that the business of the corporation was prosperous, notwithstanding which no dividend had been declared for nine years; that the principal part of the company's business had been absorbed by a partnership, whereof the president of the company and two of the directors constituted a majority of the partners; that there was a contract of partnership between the company and said firm, whereby the said president and directors took advantage of their position to advance their interests to the disadvantage of the corporation, and that the corporation had transferred real estate to trustees to secure an alleged indebtedness to the estate of a former president, the trustees being interested in such estate; that at meetings of the stockholders as well

(1) Com. *v.* Phila. & Reading R. R. Co., 3 D. R., 115 (1893). See Com. *v.* Coit, 15 W. N. C., 484 (1885). In Com. ex rel. *v.* Reeves, 13 W. N. C., 177 (1883) a rule to show cause why a writ of mandamus should not issue to compel the exhibition of corporate books was discharged on the ground that the stockholders' remedy was in equity.

as at other times relator had asked for information and had been refused; that he proposed filing a bill in equity against the corporation and its officers, for which purpose it was necessary that he should see the books and papers, in order to state the facts correctly. Held, that the writ should issue for the production of such books and papers as contained information specified in the prayer of the petitioner.[2]

But where the relation of a stockholder praying for a mandamus requiring a corporation to permit him to copy the list of stockholders, under the provisions of Sec. 2, Art. 17, of the Constitution, set forth as the purpose thereof merely that the relator might confer with his fellow stockholders to the end that they might join with him in a stockholders' bill to set aside as illegal and fraudulent a lease attempted by said company, the writ was quashed.

"He does not allege that he will be in any way injured by the proposed lease, or that there are others whose rights will be injured, or that they are necessary parties, or that he cannot maintain his bill without them. . . . . Without the statement or definition of some wrong or injury which the relators or the others may suffer in consequence of the denial of the right to make a copy of the list of stockholders, we cannot appreciate the propriety of the court's lending the aid of a mandamus to a litigant who avows no other purpose than the one stated."[3]

In a suit to foreclose a mortgage given by a corporation in the hands of a receiver, a creditor of such corporation will not be allowed to inspect the books of the company before hearing, when the purpose is not clearly stated so as to show petitioner's interest, the information desired and the purpose. The order asked for was not against the plaintiffs, owners of bonds payment of interest on which had not been made by the defendant corporation, but against a co-defendant, and there was no averment of collusion, that the bonds were illegally issued or that the plaintiffs were not bona fide owners of the necessary amount.[4]

A stockholder in a private corporation who is denied access to corporate records and information as to corporate affairs is, in the absence of denial, on allegation of fraudulent collusion, and

(2) Com. *v.* Phœnix Iron Co., 105 Pa., 111 (1884); Phœnix Iron Co. *v.* Com., 113 Pa., 563 (1886); 18 W. N. C., 250.

(3) Com. *v.* Empire Pass. Ry. Co., 134 Pa., 237 (1890); 26 W. N. C., 26; 47 Leg. Int., 375.

(4) Thomas et al. *v.* Lansdale & Norristown Elec. Ry. Co., 29 Pa. C. C., 532 (1904).

declaration of purpose to file a bill to correct the alleged wrong, entitled to an inspection of the books and papers of the corporation. But an application to the proper officers for such examination and a refusal must be alleged, in order to obtain a decree.[5]

Where the majority stockholders of a corporation have been seeking to purchase the stock at a price much below par, and the majority controlling the company have given the minority stockholders no information as to the financial standing of the company, the latter are entitled to an opportunity to examine the books and papers of the corporation to ascertain the value of the stock, and if this is refused them, their right may be enforced by mandamus.[6]

A relator should, therefore, set out in his petition some illegal or wrongful act upon the part of the corporation whereby he is injured; the action which he contemplates taking to redress the same; that an inspection of the books and papers is necessary to that end and why it is necessary, and that he has applied to the proper officers for such an inspection, and been refused permission to make the same. A proper demand in writing, correctly addressed, stamped and mailed will be presumed to have reached its destination, but this presumption may be rebutted by evidence that it was not received, and in such case the question is one for the jury.[7] If the relator sets out that he wishes to examine the stock lists for the purpose of getting other stockholders to cooperate with him in the proposed proceeding, he should show that such other stockholders are injured by the act complained of and the necessity for their joining with him in such proceeding.

The Court of Common Pleas of a county wherein a corporation has its plant and transacts most of its business has jurisdiction in mandamus to compel it to permit an inspection of its books by a stockholder, although its principal office is in another county.[8]

A writ of mandamus to compel the officers of a corporation to permit the inspection of books should join the corporation as defendant.[9]

(5) Com. *v.* Pa. R. R. Co., 6 D. R., 266 (1897).
(6) Neubert *v.* Armstrong Water Co., 211 Pa., 582 (1905).
(7) Neubert *v.* Armstrong Water Co., 211 Pa., 582 (1905).
(8) Neubert *v.* Armstrong Water Co., 211 Pa., 582 (1905).
(9) Com. *v.* Reeves et al., 13 W. N. C., 45 (1884); Com. *v.* Coit et al., 15 W. N. C., 270 (1884). *Contra* Com. *v.* Keim et al., 38 Leg. Int., 32; 15 Phila., 1 (1881).

Holders of preferred stock have the same right to examine the books of their respective corporations that the holders of common stock have.[10]

A member of an incorporated political club who has been refused an opportunity to inspect the club membership by the directors and the officer having custody of the list of members, has a standing to petition for a writ of mandamus to enforce his right to inspect the list, and his prayer will be granted, if it appear that the object of inspection was to institute measures to promote the object for which the club was organized and to prevent it from being used for improper purposes.[11]

116. Production of Books of Corporations.

Where the officers of a corporation will not give up the books to the receiver, the proper practice is to procure a rule to show cause why they should not produce the same, or a decree of court to produce the books. A rule to show cause why they should not be punished for contempt should not be procured in the first instance.[12]

In an action by an attorney at law to recover counsel fees from a corporation, where notice to produce the minute book has been disregarded, secondary evidence may be introduced to show that the president of the corporation employed the plaintiff and that his action was subsequently ratified by a resolution of the directors.[13]

Where the secretary of a company was required to produce the books thereof, under a subpœna duces tecum, the counsel for the party calling the witness contended that he was entitled to have the books produced without swearing the witness. Held, that before books and papers can even be examined, they must be identified, and it must be made to appear that they are under the control of the witness, and as the burden of proof is on the plaintiff he must for this purpose call and swear a witness.[14]

In an action to recover penalty for not posting statement as required by Act of May 22, 1878, P. L., 104, by persons and cor-

(10) Marshall *v.* American Caramel Co., 9 D. R., 152 (1900).
(11) McClintock *v.* Young Republicans, 210 Pa., 115 (1904).
(12) Leslie *v.* Mahoning Ry. Co., 22 Pa. C. C., 300 (1899).
(13) Strawbridge et al. *v.* Clamond Telephone Co., 195 Pa., 118 (1900).
(14) Monroe *v.* Mechanics etc. Bldg. Assn., 14 W. N. C., 107 (1883).

porations engaged in the transportation of petroleum, held that an individual cannot be compelled to produce his books as evidence against himself.[15]

But where the president of a corporation which is in the hands of a receiver has been indicted for embezzlement, the Court of Common Pleas which has appointed the receiver will entertain a petition of the district attorney and the prosecutrix in the criminal proceeding, for leave to examine the books, papers and accounts of the company in the hands of a receiver, although such examination may furnish evidence against the person indicted.[16]

A corporation may not refuse to produce its books and papers in a suit by a citizen to recover damages sustained by discrimination against him in freight rates in violation of the Interstate Commerce Acts, upon the grounds that the documents to be produced would incriminate it, a corporation not being within the constitutional provision which relieves a citizen from giving evidence tending to incriminate him.[17]

Under Sec. 724 of the U. S. Revised Statutes a rule for the production of books and papers will be made absolute before trial, and not left open for settlement at the trial.[18]

An order made pending an action at law, on petition and motion under Sec. 1, Act of February 27, 1798, 3 Sm. L., 303, requiring the defendant to produce on the trial of the case papers and writings in his custody and possession, is interlocutory and not reviewable by the Supreme Court before final judgment in the court below.[19]

117. Books of a Corporation as Evidence.

That a book is the transfer book of a corporation cannot be proved by an inspection of the book. Corporation books do not prove themselves.[20]

Ordinarily the minutes of a corporation are proven by the identification of the minute book by the secretary of the company at

(15) Boyle *v.* Smithman, 146 Pa., 255 (1891).

(16) McElree et al. *v.* Darlington, 187 Pa., 593 (1898); 43 W. N. C., 129.

(17) International Coal Mining Co. *v.* Penna. R. R. Co., U. S. Cir. Ct., 16 D. R., 533 (1907).

(18) International Coal Mining Co. *v.* Penna. R. R. Co., U. S. Cir. Ct., 16 D. R., 533 (1907).

(19) Logan et al. *v.* Penna. R. R. Co., 132 Pa., 403 (1890).

(20) Pgh. Coal Co. *v.* Foster et al., 59 Pa., 365 (1868).

the time of the trial, but where it is shown that the book was never in the possession of the person who was secretary at the time of the trial and an explanation is given as to why the book was not brought into court in the regular way, the book may be admitted in evidence with proper cautionary instructions to the jury in relation to it.[20*]

The receipt book of a corporation containing entries of payments by a member is evidence against the company without producing the officer by whom they were countersigned, and such entries are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence.[21]

Corporation books are not generally evidence against a stranger, but are so against a corporator present and assenting to the entry made in them, and against those claiming under him.[22] Such books have been held to be competent evidence of the making of assessments against a member of a meadow company.[23]

The minutes of a corporation are prima facie evidence of the facts therein stated, but parole testimony is admissible to explain or supplement them.[24] Such minutes may not be excluded from evidence on the ground that the secretary of the corporation, who produces them, is a stockholder and therefore interested.[25]

Where the name of an individual appears upon the stock book of a corporation as a stockholder the presumption is that he is regularly and lawfully the holder and owner of the stock.[26] As between a corporation and a corporator the stock book is evidence of their relation; the certificate is secondary evidence.[27] And the books of a corporation are competent evidence against a corporator to prove the amount of the instalments of an unpaid subscription, as well as the calls.[28]

(20*) Wyss-Thalman *v.* Beaver Valley Brewing Company, 219 Pa., 189 (1907).

(21) North American Bldg. Assn. *v.* Sulton, 35 Pa., 463 (1860).

(22) Union Canal Co. *v.* Lloyd et al., 4 W. & S., 393 (1842); Com. *v.* Woelper, 3 S. & R., 29 (1817).

(23) Comfort *v.* Leland, 3 Whart., 81 (1837).

(24) Hammill *v.* Supreme Council of Royal Arcanum, 152 Pa., 537 (1893); Rose *v.* Independent Cheora Kadisho, 215 Pa., 68 (1906).

(25) Morgan *v.* Lehigh Valley Coal Co., 215 Pa., 443 (1906).

(26) McHose *v.* Wheeler, 45 Pa., 32 (1863). But see Phila. & W. Chester R. R. Co. *v.* Hickman, 28 Pa., 318 (1857).

(27) Bank of Commerce's Appeal, 73 Pa., 59 (1873).

(28) Bavington *v.* Pitts. & Steubenville R. R. Co., 34 Pa., 358 (1859).

To prove the acts of a corporation necessary to be done in order to their corporate existence, the books of the corporation proven by the clerk or secretary are competent evidence.[29]

Entries of credit on the books for stock assigned are worthless if founded on a transfer which did not discharge the assignor's liability.[30]

After the lapse of many years the minute books of a corporation proved to have been found in their proper place, produced by the proper officer and sworn to be the books or records of the company, are evidence in favor of the company.[31]

118. Sworn Copies of Books of Account of Transportation Companies Made Prima Facie Evidence.

Hereafter in any suit or action brought in any court within this Commonwealth in which the accounts kept by any common carrier, railroad company, chartered storage or transportation company, or other public corporation doing business within this Commonwealth are involved in an issue between other parties, and in the result of which such common carrier, railroad company, chartered storage or transportation company, or other public corporation, has no direct or pecuniary interest, a copy of the books of account of original entry of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, under the oath or affirmation of an officer or employe in charge of the books of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, filed within ten days of the date of the trial or hearing of the issue in said suit or action, shall be and become *prima facie* evidence, and the books of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, shall not be required to be produced, except upon the allegation of either party to said suit or action of specific errors therein or omissions therefrom in writing filed; and in case the party making such allegations shall fail to sustain the same when said books are produced, if required shall pay to such common carrier, railroad company, chartered storage or transportation company, or other pub-

(29) Grant *v.* Henry Clay Coal Co., 80 Pa., 208 (1876).
(30) Hays & Black *v.* Pgh. & Steubenville R. R. Co., 38 Pa., 81 (1860).
(31) Union Canal Co. *v.* Lloyd, 4 W. & S., 393 (1842).

lic corporation, such reasonable sum as the court may order and direct for expenses incurred, and loss sustained in the production of said books, otherwise the said company or corporation shall not be entitled to any compensation.[32]

119. Evidence From Bank Books.

Whenever any evidence shall be required in any civil suit or proceeding in any court of this Commonwealth, from the book entries of any bank or banker doing business at the time of such requirement, it shall be competent, upon ten days' written notice to the opposite party to produce verified copies of such entries, which shall be received in all legal proceedings as *prima facie* evidence of such book entry or entries, and a bank officer or banker shall not be compelled to produce the original book or attend as witness thereto, unless a party to the record shall file an affidavit that injustice will likely be done unless the original book is produced.[33]

To warrant such copy as provided for in the foregoing section, there must be an affidavit or the testimony of an officer of the bank stating that the book is one of the ordinary books of the bank used in the transaction of its business, that the entry is as was originally made at the time of its date, and in the usual course of its business, that there are no interlineations or erasures, that the book is in its custody and control, and that the copy has been compared with the book and is a correct copy of the same, and such book shall be open to the inspection of any interested party.[34]

Provided, That the provisions of this act shall not apply to any suit to which the bank or bankers is a party.[35]

120. Copy of Minutes of Corporation to be Prima Facie Evidence Relative to the Sale, Letting and Mortgaging of Corporate Real Estate.

Whenever any corporation may have sold, let or mortgaged or may hereafter sell, let or mortgage, any of its corporate property, real or personal, or its franchises, a copy of the minutes of any meeting of the stockholders or directors of such corporation, authorizing or directing any such sale, letting or mortgag-

(32) Act May 25, 1897, P. L. 82.
(33) Sec. 1, Act of June 22, 1883, P. L., 154.
(34) Sec. 2, Act of June 22, 1883, P. L., 154.
(35) Sec. 3, Act of June 22, 1883, P. L., 154.

ing, proven by oath or affirmation of the secretary or other proper custodian of such minutes, to be a full and true copy of the minutes of such meeting, so far as relates to any such sale, letting or mortgaging, shall be *prima facie* evidence of the matters therein set forth, in any case in which the original minutes, if duly proven, would be evidence in any judicial proceeding, relating to such property or franchises; and such copy, so probated before any officer authorized to take probate or acknowledgment of deeds for the purpose of record in this Commonwealth, may be recorded in the office for recording deeds, in the proper county, in like manner and with like effect, as other instruments of writing, relating to real estate in such county, may be recorded.[36]

Whenever any such corporation, after having sold, let or mortgaged any estate, real or personal, or franchises, may have been, or may hereafter be, dissolved in pursuance of law, such probate may be made by the secretary who kept or recorded such minutes, or by any other ex-officer of such dissolved corporation having the actual custody of said original minutes, and the averment of such facts in the probate shall be *prima facie* evidence thereof.[37]

In case of any duly authorized sale, letting or mortgaging by a corporation, the same shall not be invalidated by any informality in the execution or acknowledgment of any conveyance, mortgage or other instrument by any officer of such corporation for carrying the same into effect: *Provided,* That no defect in substance shall be deemed to be cured hereby.[38]

121. Seal.

The law in Pennsylvania does not prescribe the design of seal to be used by corporations. It is customary, however, to use a form having the name of the company and the word "Pennsylvania" about the periphery of the die, and the words "Incorporated 190 " within.

It was originally held that all contracts of a corporation must be under its corporate seal,[39] but this position was soon aban-

(36) Sec. 1, Act June 8, 1881, P. L., 69.
(37) Sec. 2, Act June 8, 1881, P. L., 69.
(38) Sec. 3, Act June 8, 1881, P. L., 69.
(39) Breckbill *v.* Turnpike Co., 3 Dallas, 496 (1799).

doned,[40] and it has since been held that a corporation may appoint agents,[41] give promissory notes, [42] make leases [43] and contract generally [44] without the use of its seal. In fact, a corporation may now contract within the sphere of its functions practically the same as a natural person may.[45]

The seal of a corporation does not prove itself; the court may inquire by what authority it is affixed.[46]

It is not necessary that proof of the sealing of an instrument should be given, but the impression of the seal must be proved by some one who knows the device,[47] preferably an officer of the corporation.[48]

The seal of a corporation, properly proven to be such, is *prima facie* evidence that the corporation duly authorized the execution of the instrument to which it is attached.[49]

The signature of the agent of a corporation executing an instrument in its behalf being proved, a common seal will be presumed to have been intended as the seal of the corporation, in the absence of competent evidence to the contrary.[50]

A corporation may adopt the seal of another, or an ink impression, but such adoption or impression must be proved. A resolution of the board of directors need not be proven to prove its adoption by the corporation. Habitual use of another's seal

(40) Overseers of the Poor, etc. *v.* Overseers, etc. of South Whitehall, 3 S. & R., 117 (1817); Chestnut Hill Tpk. Co. *v.* Rutter, 4 S. & R., 16 (1818); Rathbone *v.* Tioga Nav. Co., 2 W. & S., 74 (1841); Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa., 339 (1847); N. Y. & Wash. P. Tel. Co. *v.* Dryburg, 35 Pa., 298 (1860).

(41) N. Y. & Wash. P. Tel. Co. *v.* Dryburg, 35 Pa., 298 (1860); Wolf *v.* Goddard, 19 Watts, 544 (1840).

(42) Mechanics' Nat. Bank *v.* West Phila. P. Ry. Co., 5 W. N. C., 290 (1878).

(43) Marqueze *v.* Cresswell, 3 Pa. C. C., 559 (1887).

(44) Chestnut Hill Spring Hose Tpk. Co. *v.* Rutter, 4 S. & W., 6 (1818).

(45) McCullough *v.* Hartford Ins. Co., 2 Pa. Super. Ct., 233 (1896); 38 W. N. C., 567.

(46) St. Mary's Church, 7 S. & R., 517 (1822).

(47) Leazure *v.* Hillegas, 7 S. & R., 313 (1821); Crossman et al. *v.* Hilltown Turnpike Co., 3 Grant, 325 (1857).

(48) Farmers' & Mechanics' Tpk. Co. *v.* McCullough, 25 Pa., 303 (1855).

(49) Parkinson *v.* City of Parker, 85 Pa., 313 (1877); 5 W. N. C., 285; Little Saw Mill Valley Tpk. Co. *v.* Fed. St. & P. V. Pass. Ry. Co., 194 Pa., 144 (1899); St. John's Church *v.* Steinmetz, 18 Pa., 273 (1852).

(50) Penn. Nat. Gas Co. *v.* Cook, 123 Pa., 170 (1888); 46 Leg. Int., 148.

would be some evidence of its adoption. So would an execution of a signature opposite an impression of a seal already made furnish some evidence of adoption of such impression. Whether an instrument is sealed or not is for the court; whether or not it be sealed with the seal of a given corporation is for the jury.[51]

An instrument authenticated by the seal of the City of London will not be admitted in evidence without proof that it is the official seal of that corporation.[52]

If the charter of a corporation require a certain number of managers to constitute a quorum for the purpose of entering into contracts, a contract to which the seal of the corporation is affixed by a less number of managers than is required to make the contract is valid, provided the sealing were done by direction of a legal quorum, the seal itself being *prima facie* evidence that the contract has been entered into by the corporation. Whether or not it has been properly affixed is a matter for the jury.[53]

A bond signed by the vice-president in the name of the corporation, with the corporate seal affixed, attested by the secretary, is a sealed instrument, and it is immaterial that the seal is not opposite the vice-president's signature.[54]

A mortgage of a corporation which has not adopted a common seal is sufficient if the mortgage be executed under the hand of the president followed by a scroll, which is described as a "corporate seal," accompanied by an acknowledgment that this is the common and corporate seal of the company.[55]

The seal of a corporation is not, of itself, conclusive of an intent to make a specialty of a note that is in the ordinary form of a negotiable promissory note.[56]

(51) Crossman et al. *v.* Hilltown Tpk. Co., 3 Grant, 225 (1857). In Berks & Dau. Tpk. Co. *v.* Myers, 6 S. & R., 12 (1820) it was held that whether or not the seal has been duly affixed is for the jury.

(52) Chew *v.* Keck, 4 Rawle, 163 (1833).

(53) Berks & Dauphin Tpk. Road *v.* Myers, 6 S. & R., 12 (1820).

(54) United States to use *v.* Mercantile Trust Co., 213 Pa., 411 (1905).

(55) Nicholas v. Putnam Machine Co., 7 North. Co., 137 (1900).

(56) Seiberling *v.* Charleroi Gas Co., 11 D. R., 458 (1902).

CHAPTER IX.

MEMBERSHIP IN CORPORATIONS.

122. In Corporations with Capital Stock.
123. In Corporations Without Capital Stock.
124. Where Expulsion Proceedings are Regular Court will not Interfere.
125. Provisions of By-Laws as to Causes for Disfranchisement.
126. Accused Members must be Given Hearings before Expulsion.
127. Provisions of By-Laws as to Proceedings in Expulsion Cases Must be Strictly Followed.
128. Mandamus to Restore Expelled Members.
129. Returns to Writs of Mandamus to Restore Expelled Members.
130. Power of Expulsion Must ordinarily be Exercised by the Corporation at Large.
131. Membership in Unincorporated Associations.
132. Mandamus will not Lie Against Unincorporated Associations.

122. In Corporations With Capital Stock.

Membership in corporations with capital stock is usually gained by the obtaining of shares of their stock, and lost by parting with such stock. Originally, however, as shown in the introductory chapter, the members of a corporation and the stockholders were separate classes, and corporations still exist under old charters in which the members are not necessarily stockholders. Such a corporation is the Philadelphia Savings Institution, incorporated by Act of April 5, 1834, in the case of which it was held that members of the corporation remained such though they had parted with their stock or even though they never had any.[1] The members of corporations with capital stock may not be disfranchised, unless there be express statutory provision to that effect.

123. In Corporations Without Capital Stock.

Corporations without capital stock possess the power of disfranchisement of their members, in the absence of statutory provision, in two cases only: First, on the conviction of the member in a court of justice of an infamous crime, and secondly, where

(1) Phila. Savings Institution, 1 Whart. 461 (1836).

he has done some act prejudicial to the corporation and tending to its destruction.[2]

A vote of a beneficial association for the expulsion of one of its members is final until reversed by a court. The expelled member upon securing a decree of court in his favor should first serve the same upon the officers of the society, and until he has done this, he has no right in the society and cannot complain if ejected from the rooms of the same. Neither such ejectment nor the fact that the officers took every lawful means to oppose him amounts to a conspiracy to deprive such member of his rights, which would render them liable to damages.[3]

A beneficial society expelled a member because he brought suit against the same for sick benefits instead of submitting his claim to arbitration, as required by the by-laws. In a suit of mandamus to compel his restoration the court made the alternative writ absolute, and said: "We consider that any by-law which provides for the expulsion of a man from a society in which he has vested property interests is a violation of the Constitution of the Commonwealth."[4]

A member of an association was suspended under Art. 3, Sec. 3, of the constitution of such association, which provided for the expulsion of members in certain cases, for an alleged violation of a by-law, which provided that any sick member caught working before he had reported himself well should be fined or proceeded against according to Art. 3, Sec. 3 of the constitution. Held, that the power of expulsion does not include the power to suspend, and that a trial wherein the member was not confronted with the only witness examined, but was merely called in after the testimony was closed and asked what he had to say, and wherein he was given no opportunity to appeal to the society at large, was irregular and void.[5]

Where the constitution of an association provides for the expulsion of members who knowingly violate the rules of the order,

(2) Com. *v.* St. Patrick's Beneficial Soc., 2 Binn., 441 (1810); Evans *v.* Phila. Club, 50 Pa., 107 (1865); Weiss et al. *v.* Musical Mutual Protective Assn., 189 Pa., 446 (1899).

(3) McLafferty *v.* Sweeney, 19 W. N. C., 396 (1889).

(4) Sweeney *v.* The Rev. Hugh McLaughlin Beneficial Society, 14 W. N. C., 466 (1884). This case was affirmed by the Supreme Court (see case in preceding note) but apparently not reported.

(5) Schassberger *v.* Staendel et al., 9 W. N. C., 379 (1880).

a mere technical and unwitting violation of a rule will not justify expulsion.[6]

It has been held that in an association one of the objects of which was the aid of sick members, to feign sickness or draw relief after recovery is subversive of the objects of the association, an act tending to its destruction, and within the power of expulsion by the association.[7]

And where a member was expelled for presenting for payment a physician's bill which he had raised from four dollars to forty, the disfranchisement of the member was supported on the ground that it was a scandalous crime, directly injurious to the society.[8]

But it was held in a later case that a member who had assisted in defrauding the corporation of fifty cents, and had defamed and injured the society, was not liable to expulsion.[9]

Where two members of a private corporation were sitting together in conversation in the bar-room of the club house, and a third came in who used insulting language understood by one of the two to be applied to himself, whereupon he struck the offender, held that this was not sufficient to justify his expulsion.[10]

124. Where Expulsion Proceedings Are Regular Court Will Not Interfere.

If the offense be such as warrants expulsion under the provisions of the charter or by-laws, or under the common law, if there be no provisions in the charter or by-laws relative to the causes for which members may be expelled, and if the accused has been tried, after due notice, with opportunity for defense, in the manner provided by the charter or by-laws, where they contain provisions for such trials, or in a fair and just manner, where they do not contain such provisions, the courts will not interfere in the case of a member expelled under such circumstances.[11]

(6) Glover *v.* Farmers' & Mechanics' Lodge, 1 Del. Rep., 317 (1884); Appeal of Worrilow, 2 Del. Co. Rep., 66 (1884).

(7) Society for the Visitation, etc. *v.* Com., 52 Pa., 125 (1866).

(8) Com. *v.* Philanthropic Society, 5 Binn., 486.

(9) Com. *v.* German Society, 15 Pa., 251.

(10) Evans *v.* Phila. Club, 50 Pa., 107 (1865).

(11) Com. v. Pike Ben. Soc., 8. W. & S., 247 (1844); Com. *v.* German Soc., 15 Pa., 251 (1850); Society for the Visitation, etc. *v.* Com., 52 Pa., 125 (1866); Black and White Smiths' Society *v.* Van Dyke, 2 Whart., 312.

Where, however, a member is denied a hearing, contrary to the fundamental law of the organization, the courts will afford him a remedy.[11*]

125. Provisions of By-Laws As to Causes For Disfranchisements. The courts, however, will not sustain disfranchisements effected under the authority of by-laws which provide for the expulsion of members for trivial offenses. Expulsions made under such by-laws are void.[12]

The courts have refused to approve by-laws which provided for expulsion of members "guilty of any offense against the law," [13] or who have committed any misdemeanor or other act that may prove injurious to their character or standing [14] or are "guilty of actions which may injure the association," [15] or "guilty of unprofessional decorum or ungentlemanly conduct,"[16] or of "vilifying" the other members.[17]

Where, however, a club had by its charter authority to expel members, in such manner and for such causes as its by-laws should prescribe, and those by-laws provided for the suspension of members by a majority of the directors "for acts or conduct which they deem disorderly or injurious to the interests or hostile to the objects" of the club, with a right of appeal to the members of the club, the expulsion of a member for telling another that he was acting like a blackguard was sustained.[18]

The rule seems to be that if there be neither by-law nor charter provision for expulsion, the same may be made only for conviction of an infamous offense or an act injurious to or destructive of the corporation; if there be no charter provision, but by-laws providing for expulsion, the courts will sustain reasonable additional causes for expulsion, but not indefinite or trivial ones. If, however, there be a charter provision giving unrestricted power to provide for expulsion by by-laws, expulsions under such by-laws will be sustained, whether for trivial causes or not.

(11*) Haag *v.* Good, et al., 7 Pa. Super. Ct., 425 (1898).

(12) Evans *v.* Phila. Club, 50 Pa., 107 (1865); Leech *v.* Harris, 2 Brewst., 571 (1869).

(13) Benefic. Assn. of Brotherly Unity, 38 Pa., 299 (1861).

(14) Butchers' Benef. Assn., 38 Pa., 298 (1861).

(15) Butchers' Beneficial Assn., 35 Pa., 151 (1860).

(16) Journalists' Fund Charter, 8 Phila., 272 (1871).

(17) Com. *v.* St. Patrick's Benev. Soc., 2 Binney, 441 (1810).

(18) Com. ex rel. Burt *v.* Union League, 135 Pa., 301 (1890).

Where the constitution of a society provided that a member might be expelled for vicious and indecent practices injurious to civil society, held, that embezzling the money of the society in question was within this provision.[19]

A member of a society may not be expelled because he issued a manifesto criticising the management of the society and inviting other members to join in a meeting at which matters affecting the association were to be discussed, where there was nothing to show that the manifesto tended to cause the withdrawal of members.[20] A by-law which provides that if any member of an association shall voluntarily enlist as a soldier he shall lose his membership, will be strictly construed.[21]

Where the charter of a corporation limits the number of members, such number may not be extended by a by-law.[22]

126. Accused Members Must be Given Hearings Before Expulsion.

Before a member of a corporation may be expelled, there must be a hearing or trial, with reasonable notice and an opportunity for defense.[23]

127. Provisions of By-Laws As to Proceedings in Expulsion Cases Must be Strictly Followed.

Where the by-laws provide for the manner in which the trial shall be had and notice given, they must be strictly followed.[24] But failure to give notice may be waived by an appearance and failure to object,[25] and a trial is not necessary if the accused admit the truth of the charges made against him.[26]

Where the by-laws provide that no member shall be expelled

(19) Com. *v.* Kensington Germ. Benef. Assn., 41 Leg. Int., 174; 17 Phila., 277 (1885).

(20) Weiss et al. *v.* Musical Mut. Protective Assn., 189 Pa., 446 (1899).

(21) Franklin Benef. Assn. *v.* Com., 10 Pa., 357 (1849).

(22) Diligent Fire Co. *v.* Com., 75 Pa. 291 (1874).

(23) Com. *v.* Penna. Benef. Inst., 2 S. & R., 141 (1815); Com. *v.* German Soc., etc., 15 Pa. 251 (1850); Riddell *v.* Harmony Fire Co., 8 Phila., 310; Diligent Fire Co. *v.* Com., 75 Pa., 291 (1874).

(24) Young *v.* Sons of Progress, 173 Pa., 302 (1896); Com. *v.* Guardians of the Poor, 6 S. & R., 469 (1821); Society for the Visitation, etc., 52 Pa., 125 (1866); Com. *v.* Pike Beneficial Society, 8 W. & S., 247.

(25) Com. *v.* Penna. Benef. Soc., 2 S. & R., 141 (1851); Sperry's Ap., 9 Atl., 478; 116 Pa. 391 (1877).

(26) Moxey's Appeal, 9 W. N. C., 441 (1881).

without first having had a copy of the charge or charges exhibited against him certified and delivered at his residence twenty-four hours previous to his expulsion, an omission to give such notice was held to render an expulsion invalid.[27]

Where a by-law required that a vote of two-thirds should be necessary to expel, and a member was given a hearing agreeably to the by-laws, and after his defense a resolution reciting that he had failed in his duty as a director failed to pass by a two-thirds vote, which was equivalent to an acquittal, and a subsequent vote of two-thirds was afterwards given for his expulsion, without new charges having been made or a further hearing given, held, that such expulsion was illegal and void.[28]

A member of a corporation cannot be expelled, without notice, for the non-payment of dues.[29]

128. Mandamus to Restore Expelled Members.

Mandamus is the remedy to prevent a person from being expelled from membership in a corporation, or to restore him after expulsion, but mandamus will not lie where a valid authority to expel exists and has been exercised in a regular manner. A court will not go into the merits of a case under such circumstances.[30]

In a case of the disfranchisement of a corporator the courts will entertain jurisdiction to restore him by mandamus where the cause is insufficient or the proceedings are irregular, but they will not inquire into the merits of what has been passed upon in the regular course of proceedings.

129. Returns to Writs of Mandamus to Restore Expelled Members.

The return to a mandamus to restore a corporator must distinctly set forth all the facts of amotion, that the court may judge of its sufficiency, both as to the cause and the form of proceeding. The return must show that the relator had notice to

(27) Washington Benef. Assn. *v.* Bacher, 20 Pa., 425 (1853).

(28) Com. *v.* Guardians of the Poor, 6 S. & R., 469 (1821).

(29) Com. *v.* Beneficial Soc., 2 S. & R., 141 (1815); Com. ex rel. Fischer, 15 Pa., 251 (1850); Diligent Fire Co. *v.* Com., 75 Pa., 291 (1874).

(30) Soc. for Visitation, etc. *v.* Com., 52 Pa., 125 (1866); Com. ex rel. Fischer *v.* German Soc., 15 Pa., 251 (1850); Sperry's Appeal, 116 Pa., 391 (1877); Leech *v.* Harris, 2 Brewst., 571 (1868); Com. *v.* Benef. Assn., 41 Leg. Int., 174.

appear and defend himself, and that an assembly of the proper persons was duly held, the proceedings before them, a conviction of the offense, and an actual amotion by them. It is irregular to expel a member without giving him an opportunity to be heard in his defense before the members of the corporation at large.[31]

A return to a mandamus, stating in general terms that a member was expelled for a violation of duty, without specifying the charges on which he was convicted is bad.[32]

So where a charter provided that a member should be expelled on the conviction of certain charges, on the deposition of two or more credible witnesses, the return to a writ of mandamus must show that at least two witnesses were heard, and that the charges were either confessed or proven, and must also show notice to appear, a hearing on the charges, the proceedings had at such hearing and the action taken thereon.[33]

Where a member is tried on charges by a committee, the return should set forth the manner and by what authority the committee was appointed.[34]

Where a bill in equity to compel reinstatement of the plaintiff as a member of a charitable association states that the plaintiff has complied with all the laws of the association and has never done anything to warrant his expulsion, but that he was expelled because he had caused certain members to be arrested for violating the Sunday laws, held, that the bill was not demurrable because it failed to allege, further, that the plaintiff was illegally expelled.[35]

Offenses of a member of a corporation against his duty as a member of the corporation must be stated as found after a formal investigation, and must not rest on inference alone. The return to a writ of mandamus stated that while the member was drawing a sick benefit from the association he was training his dog to fetch stones out of the water, on a certain day, and that on the evening of the same day he attended a wedding. Held, that the return was not sufficient.[36]

(31) Com. ex rel. Fischer *v.* German Society, 15 Pa., 251 (1850).
(32) Com. *v.* Guardians of the Poor, 6 S. & R., 469 (1821).
(33) Com. *v.* German Society, 15 Pa., 251 (1850).
(34) Green *v.* African Meth. Epis. Church, 1 S. & R., 254 (1815).
(35) Manning *v.* Klein, 11 Pa. C. C., 525 (1892).
(36) Schweiger *v.* Society, 13 Phila., 113 (1879).

130. The Power of Expulsion Must Ordinarily Be Exercised By the Corporation at Large.

The power of expelling members of a society, club or corporation belongs to the body at large, and in the absence of the clearest authority in the constitution and by-laws cannot be delegated to a committee or the officers.[37]

"The transfer from the body of the society, where it properly belongs, to a small fraction of its members, of so large and dangerous a power as that of expulsion, must appear, if it be claimed to exist, by the plainest language. It cannot be established by inference or presumption, for no such presumption is to be made in derogation of the rights of the whole body, nor is it to be supposed, unless it appears by the most express and unambiguous language that the members of the society have consented to hold their rights and membership by so frail a tenure as the judgment of a small portion of their own members." [38]

131. Membership in Unincorporated Associations.

The law is the same in regard to the powers of unincorporated associations to expel their members as in the case of incorporated associations. Such unincorporated associations may, therefore, expel members where the charter of the society provides for the offense, directs the mode of proceeding and authorizes the society on the conviction of a member to expel him, and where there are no provisions in the constitution or by-laws, a member may be expelled after conviction of an infamous crime, or for offenses against the association. The law, however, does not permit these societies to insert in their charters or constitutions indefinite powers of expulsion of their members, much less do they have such indefinite powers existing among themselves.[39]

There must be a trial and opportunity for defense whether the constitution and by-laws provide therefor or not, and this is so even where the association has no property or assets.[40]

(37) Bacon's Benefit Societies & Life Ins., Ed., 1888. Sec. 100.

(38) Hassler *v.* Phila. Mus. Assn., 14 Phila., 233 (1880); 37 Leg. Int., 434.

(39) Leech *v.* Harris et al., 2 Brewst., 571 (1869).

(40) Metropolitan Base Ball Club *v.* Simmons et al., 17 W. N. C., 153 (1885). See Smith *v.* Hollis, 33 W. N. C., 485 (1893), but the association in the latter case was a Republican ward executive committee, the value of the right of membership in which was nil.

As in the case of incorporated associations, the courts will not inquire into the merits of the case, if the member has been tried according to the regulations of the association and his offense was such that he might properly be expelled therefor.[41]

An unincorporated association will not be permitted to expel a member without permitting him to exercise the right of appeal guaranteed to him by its constitution or by-laws.[42]

Where the supreme chancellor of an order was vested with a "watchful supervision over all lodges, grand and subordinate," and empowered to "see that all the constitutional enactments, rules and edicts of the supreme lodge are duly and promptly observed, and that the work, dress and discipline of the order is uniform everywhere," it was held that such supreme chancellor might not suspend the grand chancellor of a State, in the exercise of the powers so conferred.[43]

Montezuma Lodge, Order of Red Men, was suspended by the Grand Tribe for not contributing one dollar for each member thereof as special dues in aid of a fund for the completion of a hall. The lodge then agreed to obey the order of the Grand Tribe, which revoked the suspension as to the lodge and all of its members who should sign a pledge of obedience. A minority of the lodge held a meeting and resolved, under the circumstances, that all members who did not agree to contribute one dollar per year, for the construction of said hall, should not be permitted to attend the meeting, and proceeded to expel such members, and prevent them from entering the rooms of the lodge. The bill brought by the expelled members was dismissed without prejudice to the rights of the complainants to appeal under the by-laws of the association.[44]

132. Mandamus Does Not Lie Against Unincorporated Associations.

Mandamus does not lie against unincorporated associations or their officers, and the remedy of members of such associations

(41) Dodd *v.* Armstrong et al., 18 Phila., 399 (1896).
(42) Powell *v.* Abbott et al., 9 W. N. C., 231 (1885).
(43) Knights of Pythias Case. Com. *v.* Lowry, 3 Brewst., 452.
(44) Bauer et al. *v.* Seeger et al., 2 W. N. C., 242 (1875).

unlawfully expelled or threatened with expulsion is by bill in equity.[45]

The Courts of Common Pleas are given equity jurisdiction over unincorporated associations by Sec. 13, Act of June 16, 1836, P. L., 789:

"The Supreme Court and the several Courts of Common Pleas shall have the jurisdiction and powers of a court of chancery so far as relates to . . . . The supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations and partnerships."

(45) Wolf *v.* Com., 64 Pa., 252 (1870); Manning *v.* Klein et al., 1 Super. Ct., 210 (1896). See Bauer et al. *v.* Seeger et al., 2 W. N. C., 242 (1875); Met. Base Ball Club *v.* Simmons, 17 W. N. C., 153 (1885); 1 Pa. C. C., 134.

CHAPTER X.

OFFICERS OF CORPORATIONS OTHER THAN DIRECTORS—AGENTS.

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133. Officers and their Duties.

. . . . The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a

treasurer and such other officers, agents and factors as the corporation authorizes for that purpose, and nothing in any law contained shall prevent or be construed to prohibit the vice-president, treasurer, solicitor or other officer of any corporation organized or existing under this act, from being a director of such company, and receiving at the same time such compensation for his services as such officer as the board of directors of such company may direct. . . . . The secretary or clerk shall be sworn and shall record all the votes of the corporation and the minutes of its transactions in a book to be kept for that purpose. The treasurer shall give bond in such sum, and with such sureties, as shall be required by the by-laws for the faithful discharge of his duties, and he shall keep the moneys of the corporation in a separate book account to his credit as treasurer, and if he shall neglect or refuse so to do he shall be liable to a penalty of fifty dollars for every day he shall fail to do so, to be recovered at the suit of any informer in an action of debt.[1]

134. Salaried Officers May Serve As Directors.

It shall be lawful for any vice-president, treasurer or other salaried officer of any trust, deposit or other purely private or business corporation, to hereafter serve, or to have heretofore concurrently served, such corporation as a director thereof, when lawfully elected to said position.[2]

135. Embezzlement by Officers and Employes of Corporations.

If any person, being an officer, director, superintendent, manager, receiver, employe, agent, attorney, broker, or member of any bank or other body corporate, or public company, municipal or quasi municipal corporation, shall fraudulently take, convert or apply to his own use, or the use of any other person, any of the money or other property of such bank, body corporate or company, municipal or quasi municipal corporation, or belonging to any person or persons, corporation or association, and deposited

(1) Act of May 14, 1891, P. L., 61, amending Sec. 5 of the Act of April 29, 1874, P. L., 73.

(2) Act of May 20, 1891, P. L., 101. This act provides as to corporations not formed under the Act of 1874, what is provided as to corporations formed thereunder by the preceding Act of May 14, 1891, supra.

therein, or in possession thereof, he shall be guilty of a misdemeanor.[3]

136. Keeping of Fraudulent Accounts.

If any person, being an officer, director, superintendent, manager, receiver, employe, agent, attorney, broker, or member of any body corporate or public company, or municipal or quasi municipal corporation, shall as such receive or possess himself of any money or other property of such corporate or public company, municipal or quasi municipal corporation, otherwise than in payment to him of a just debt or demand, and shall, with intent to defraud, omit to make or cause or direct to be made, a full and true entry thereof in the books and accounts of such body corporate, public company, municipal or quasi municipal corporation, he shall be guilty of a misdemeanor.[4]

137. Destroying or Mutilating Books of a Corporation.

If any officer, director, superintendent, manager, receiver, employe, agent, attorney, broker, or member of any bank or other body corporate, or public company, municipal or quasi municipal corporation, shall, with intent to defraud, destroy, alter, mutilate or falsify any of the books, papers, writings or securities belonging to the bank, body corporate or public company, municipal or quasi municipal corporation, of which he is a director, officer, superintendent, manager, receiver, employe, agent, attorney, broker or member, or shall make or concur in the making of any false entry or any material omission in any book of accounts or other document, he shall be guilty of a misdemeanor.[5]

138. False Statements by Officers, etc., of Corporations.

If any officer, director, superintendent, manager, receiver, employe, agent, attorney, broker, or member of any bank or other body corporate, or public company, municipal or quasi municipal corporation, shall make, circulate or publish, or concur in making, circulating or publishing, any written or printed statement or ac-

(3) Sec. 1, Act June 12, 1878, P. L., 196, amending Sec. 116, Act March 31, 1860, P. L., 382.

(4) Sec. 2, Act June 12, 1878, P. L., 196, amending Sec. 117, Act March 31, 1860, P. L., 382.

(5) Sec. 3, Act June 12, 1878, P. L., 197, amending Sec. 118, Act March 31, 1860, P. L., 382.

count, which he shall know to be false in any particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, municipal or quasi municipal corporation, or with intent to induce any person to become a shareholder or partner therein, or to interest or advance any money or property to such body corporate or public company or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor.[6]

139. Punishment for the Foregoing Misdemeanors.

Every person found guilty of a misdemeanor under any or either of the preceding sections of this title, wherein the nature and extent of the punishment is not specified, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding six years.[7]

140. When Prosecutions May Be Begun.

Indictments for misdemeanors committed by any officer, director, receiver, superintendent, manager, broker, attorney, agent, employe or member of any bank, body corporate or public company, municipal or quasi municipal corporation, may be commenced and prosecuted at any time within four years from the time the alleged offense shall have been committed.[8]

141. Execution of Trusts—Who to Make Oath.

In all cases where a corporation is or shall be charged with the execution of any trust, the president, vice-president, trust officer, secretary, treasurer or actuary of such corporation shall make the usual oath or affirmation directed to be taken by private persons in such other like cases.[9]

142. Officers of Corporations Not to Contract to Furnish Supplies or Materials Thereto.

It shall not be lawful for any councilman, burgess, trustee,

(6) Sec. 4, Act June 12, 1878, P. L., 197, amending Sec. 119, Act March 31, 1860, P. L., 382.

(7) Sec. 5, Act June 12, 1878, P. L., 197.

(8) Sec. 6, Act of June 12, 1878, P. L., 197. The Act of June 12, 1878, P. L., 196, does not apply to officers of national banks. Allen's Appeal, 119 Pa., 192 (1888); Com. *v.* Ketner, 92 Pa., 372 (1880).

(9) Act of February 16, 1877, Sec. 1, P. L., 3.

manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom,[10] or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in any wise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly or indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder, and shall be held guilty of misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding five hundred dollars: *Provided,* That nothing in this section contained, shall prevent a vice-president of any bank from being a director of such bank, or of receiving a salary as vice-president.[11]

Any person who shall contract for the sale or sell any supplies or materials as aforesaid, and shall cause to be interested in any such contract or sale, any member, officer or agent of any corporation, municipality or institution, or give or offer to give any such person any reward or gratuity, to influence him or them in the discharge of their official duties, shall not be capable of recovering anything upon any contract or sale, in relation to which he may have so practiced or attempted to practice corruptly, but the same shall be void, and such party shall be guilty of a misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding five hundred dollars.[12]

If any officer of any municipal or other corporation, not authorized by law, shall be instrumental in, or shall consent to or connive at the making or issuing of any note, bill, check, ticket or order, intended to be used as currency, he shall be guilty of a

(10) So much of this section as prohibits directors acting as officers of corporations is repealed by Act of May 20, 1891, P. L., 101. See Sections 133 and 134.

(11) Sec. 66, Act of March 31st, 1860, P. L., 400. See Act April 26, 1855, Sec. 1, P. L., 328.

(12) Sec. 67, Act of March 31st, 1860, P. L., 400.

misdemeanor, and on conviction thereof be sentenced to pay a fine not exceeding one thousand dollars for each offense, and to undergo an imprisonment not exceeding six months.[13]

The directors and officers of an electric light company (and probably those of all private corporations) are not subject to the penalty imposed by the 66th section of the Act of March 31st, 1860, P. L., 400, supra, upon such directors and officers as are interested in contracts for furnishing supplies or materials to their respective corporations.[14]

But where the owner of property purchased by municipal or other public corporations is a member of the councils or other governing board of the same, and his vote was necessary to the passage of the ordinance or resolution providing for the purchase, or where a franchise is conferred upon a corporation by a municipality and the ordinance providing therefor was passed by means of the votes of councilmen who are stockholders of said company, such purchase and franchise are void.[15]

A contract made between a corporation and a board of school directors to build a school house is illegal and void if a member of the board is also a stockholder in the corporation, such contract being in violation of the Act of March 31, 1860.[16]

143. Election of Officers.

The power to elect both officers and members is an incident of every corporation. It is not necessary that such a power should be expressly conferred by charter. If the power is not expressly lodged in other hands, it must be exercised by the company at large, but this power of election may, by the charter, be taken from the body at large and reposed in the body of directors or any other selected body.[17]

(13) Sec. 68, Act March 31st, 1860, P. L., 400.

(14) Com. *v.* Baldwin, 5 Pa. C. C., 509 (1888); Keystone Surgical Supply Mfg. Co. *v.* Bate, 187 Pa., 460 (1898).

(15) Milford Borough *v.* Milford Water Co., 124 Pa., 610 (1889); Trainer *v.* Wolfe, 140 Pa., 279 (1891); Marshall *v.* Ellwood City, 189 Pa., 348 (1899).

(16) Ellwood Lumber Co. *v.* Frey, 19 Pa. C. C., 56 (1897). But see Trainer *v.* Wolfe, 140 Pa., 279 (1891).

(17) Com. *v.* Gill, 3 Whart., 246. See Chapter 12.

144. General Powers of Officers Other Than Directors.

The president, vice-president, secretary and treasurer of a corporation have, in general, no powers to contract for the corporation. The duties of the president are to preside and to act as a director; those of the secretary to keep the books and minutes of the company, and those of the treasurer to receive, keep and disburse the funds thereof. Whatever other powers they have are either derived from the by-laws or expressly conferred by the board of directors. They may, however, through a course of dealing known to the corporation and acquiesced in thereby, acquire implied powers which the corporation will be estopped to deny.[18] Where a corporation holds certain persons out to the public as authorized to act on its own behalf, it will be bound by all the acts and contracts of such persons which are done or made within the apparent scope of their agency.[18*] A cashier occupies a different position from that of other officers and has, ex officio, very broad powers.[19]

Where officers act within the scope of their powers the corporation is, of course, bound thereby.[20] And, in certain cases, as where the cashier of a bank without authority to do so offered a reward for the arrest of persons who had robbed the bank, where the unauthorized act of the officer is known to the directors, but they do not officially disavow the act, such failure to promptly disavow will bind the corporation.[21] Even where an act beyond the corporate powers is performed by an officer, with the knowledge of the directors, the company may be liable, as where such officer buys stocks, which the company has no power to deal in, and embezzles the same.[22]

The by-laws of a corporation are a part of its charter, and in dealing with an officer of a corporation, parties are upon notice as to the extent of the officer's authority to bind the corporation.[23]

(18) See Secs. 158-161, President; Sec. 163, Treasurer. Independent B. & L. Assn. *v.* Real Estate Title Co., 156 Pa., 181 (1893).

(18*) Bascom *v.* Danville Stove & Mfg. Co., 182 Pa., 427 (1897).

(19) See Sec. 164, Cashier.

(20) Nippenose Mfg. Co. *v.* Stadon, 68 Pa., 256 (1871); Ardesco Oil Co. *v.* Gibson, 63 Pa., 146 (1869); Caley *v.* Phila. & Chester R. R. Co., 80 Pa., 363 (1876).

(21) Kelsey *v.* Nat. Bank of Crawford County, 69 Pa., 426 (1871).

(22) Searle *v.* Bank of Montrose, 2 Walker, 395 (1885).

(23) Harvey *v.* Schuylkill Real Estate Title & Trust Co., 24 Pa. C. C., 593 (1900).

145. Removal and Reinstatement of Officers.

. The right to a corporate office can be tried only by a proceeding in quo warranto. It cannot be tried in a proceeding for an injunction.[24] Mandamus lies to reinstate an officer who has been wrongfully ousted from his office.[25]

146. Officers are Agents.

The officers of corporations (other than directors, who are trustees)[26] are agents of their corporations and the stockholders thereof, and cannot make a profit out of their principals.[27]

"When a corporation designates an officer or a committee as its agent to receive moneys due it, and this is known to those who intend to pay, or if they have the means of knowledge, then a payment to another officer or committee is only a payment to the corporation if it actually receives the money. Notwithstanding this, the corporation may by its conduct depart from its appointed method and set up a different one, which under certain circumstances will be binding upon it. The legal principle is this: The authority of an officer of a corporation as its agent although distinctly designated by the corporation, may be ascertained to be different, from circumstances covering a period of time long enough to manifest a course of dealing, providing such circumstances are known also to and acquiesced in by the board of directors, and if the course of dealing is one the board had power to authorize." [27*]

Where officers of a corporation appointed an agent to purchase certain shares of stock for the company "for the use of said company," but after the purchase the officers distributed the stock among themselves, held, that a stockholder might recover in case to the amount of the injury sustained by him, the measure of damages being the actual value at the time of purchase, less the amount paid thereon, of the number of shares to which his interest in the company would entitle him.[28]

(24) See Chapter 22, Quo Warranto, Sec. 517.

(25) Com. *v.* Christian, 9 Phila., 556 (1872).

(26) See Sec. 189.

(27) Simons et al. *v.* Vulcan Oil & Mining Co., 61 Pa., 202 (1869).

(27*) Louchheim *v.* Somerset B. & L. Assn., 211 Pa., 499 (1905); reversing Same *v.* Same, 25 Pa. Super. Ct., 325 (1904).

(28) Kimmel *v.* Stoner, 18 Pa., 155 (1851); Kimmel *v.* Getting, 2 Grant, 125 (1853). But see Craig *v.* Gregg, 83 Pa., 19 (1876) as to an individual action by a stockholder. See Secs. 168-173. Agents.

The treasurer of a corporation cannot maintain a suit against the company on a claim against it which he has purchased. A confidential agent cannot create relations which place him in hostility to his principal. Such a purchase of a debt is an extinguishment of it against the corporation.[29] This rule does not apply, however, to the purchase of a debt due by the corporation after the corporation has made an assignment for the benefit of creditors by one who has been the treasurer of the corporation up to the date of the assignment, and who has parted with the control and possession of its funds. Such officer is not estopped from purchasing after such assignment, with his own funds, *bona fide* claims against the company, and claim payment therefor out of the assets, he not being indebted to the company.[30] The president of a corporation cannot purchase a claim against it at a discount and then collect the full amount.[31]

A corporation will be bound by an agreement relating to a building operation made by a person assuming to be its agent, where it appears that such person was a large stockholder and a director of the corporation, a member of its executive committee, secretary and treasurer and the person named in the building contract as the representative of the company to whom reports were to be made by the building inspector and who was apparently the general representative of the corporation.[31*]

147. Releases Given by Officers.

A release given by the secretary and treasurer of a corporation to a debtor from a liability, without express authority under the charter or by-laws, or by act of the company, or implied authority from a course of dealing known and sanctioned by it, will not bind the company.[32]

148. Sureties of Officers.

Mere forbearance to the principal, however prejudicial to the surety, will not discharge the surety. The same rule applies to sureties for officers of corporations who have duties requiring

(29) Hill *v.* Frazier, 22 Pa., 320 (1853).

(30) Hammond's Appeal, 23 W. N. C., 59 (1888); 123 Pa., 503; Craig's Appeal, 92 Pa., 396 (1880).

(31) Bickel *v.* Phila. Wood Paving Co., 2 Walker, 150 (1881).

(31*) Culver *v.* Pocono Springs W. I. Co., 206 Pa., 480 (1903).

(32) Moshannon Land & Lumber Co. *v.* Sloan, 42 Leg. Int., 416 (1885).

the receipt and disbursement of various sums of money, as to a surety for the payment of a single sum. The rules of a railroad company required from its cashier monthly reports and payments. The bond of the cashier and his sureties was conditioned that he should faithfully discharge his duties, as required by the rules, a copy of which he acknowledged to have received. He failed to account and pay over for six months, when he was dismissed. Three months later his sureties were notified. Held, that they were not discharged.[33]

A had been annually elected treasurer of a society for a number of years. He was elected in 1861, his books showing a balance then in his hands. He gave bond with sureties to deliver at the expiration of his term all moneys, etc. He resigned, having received since his last election less money than he had paid out during the same time, but, from moneys previously received, there was a balance against him. Held, that the sureties were liable on the bond.[34]

In an action against a corporation, surety for an officer of the corporation plaintiff, the question whether the loss on account of the dishonesty of such officer was covered by the contract, is for the jury and not for the court.[34*]

149. What Acts of Officers Will be Considered Official.

Where officers signed a contract without affixing their official titles, and using their private seals, the appearance is that it is their individual contract,[35] but that appearance—rights of third parties misled by it being out of the way—does not preclude proof that it was intended, and was in reality, the contract of their corporation.[36]

150. De Facto Officers.

A de facto officer is one who actually performs the duties of an office, with apparent right, and under claim and color of an ap-

(33) Pgh., Ft. W. & Chic. Ry. Co. *v.* Schaeffer, 59 Pa., 350 (1868).

(34) Beyerle *v.* Hain, 61 Pa., 226 (1869).

(34*) Harrisburg S. & L. Assn. *v.* U. S. F. & G. Co., 197 Pa., 177 (1900).

(35) Campbell *v.* Baker, 2 Watts, 83; Sharpe *v.* Bellis, 61 Pa., 69; Quigley v. De Haas, 82 Pa., 267.

(36) Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa., 526 (1898); Wanner *v.* Emanuel's Church, 174 Pa., 466 (1896).

pointment or election, but whose title to such office is defective.[37]

A corporation may act by means of officers de facto as fully and effectually as regards the public and third persons as by officers de jure, in all matters within the scope of the corporation's ordinary business; and there is no distinction in this respect between de facto officers of public corporations and de facto officers of private ones.[38]

Directors of a corporation were ousted from office by decree of court. While acting as directors they had control of the books and property of the corporation. They made contracts for the erection of a fair building and offered premiums to exhibitors. Held, that the corporation was liable for the premiums and on the contracts.[39]

Acts of officers de facto of corporations, however, are not valid when such acts are for their own benefit, because they cannot take advantage of their own want of title, of which they must be held to be cognizant. It is only where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defects of title, that their acts are valid.[40]

One who is elected to an office of a corporation by the body in which the power to elect is vested, but by a less number of that body than the charter requires, is an officer de facto, and his acts, at least as they respect third persons, are binding on the corporation.[41]

Promissory notes signed by de facto officers of a corporation are binding upon such company.[42]

A judgment confessed by a corporation for a valid debt will not be stricken off because the confession of judgment was not authorized by a board of directors duly elected by the stockholders, where it appears that all of the stockholders were directors, and

(37) Brown *v.* Lunt, 37 Me., 428 (1854); Baird *v.* Bank of Washington, 11 S. & R., 411 (1824).

(38) Zearfoss *v.* Farmers' & Mechanics' Inst., 154 Pa., 449 (1893).

(39) Zearfoss *v.* Farmers' & Mechanics' Inst., 154 Pa., 449 (1893).

(40) Shellenberger *v.* Patterson, 168 Pa., 30 (1895); Riddle *v.* County of Bedford, 7 S. & R., 386 (1821); Keyser *v.* M'Kissan, 2 Rawle, 139 (1828); Kingsbury *v.* Ledyard, 2 W. & S., 41 (1841). See Jordan *v.* Washington & C. Ry. Co., 25 Pa. Super. Ct., 564 (1904).

(41) Baird *v.* Bank of Washington, 11 S. & R., 411 (1824).

(42) Wanner *v.* Emanuel's Church, 174 Pa., 466 (1896); M'Gargell *v.* Hazleton Coal Company, 4 W. & S., 424 (1842).

that vacancies in the board of directors had been filled, as they occurred, at directors' meetings.[43]

In an action brought in the name of a corporation by direction of de facto officers, to recover for injury done to realty held by the corporation as a member of a religious association, an offer to prove that the officers and congregation are not adherents of the orthodox association, but of a schismatic body calling itself by the same name, and hence not entitled to act as officers, is not admissible unless followed by evidence that there is in existence a body of officers, other than the plaintiffs, of the corporation.[44]

An officer holding over after the expiration of his term, before the qualification of his successor, is at least an officer de facto, and his official acts are binding upon the corporation.[45]

Where an agreement exists between two corporations for the use of the property of one of them by the other in consideration of the payment of certain tolls, the lessee company will not be permitted, in an action on the agreement, to show that the directors of the lessor company are residents of the State of New York, and hence ineligible for the office of director, the agreement having recognized such persons as officers de facto and the company for which they were acting having made large expenditures in pursuance of the agreement.[46]

Where de facto officers of a corporation authorized the issue of new stock, and allotted some of it to one of their number, without giving the stockholders generally an opportunity to subscribe for it, the director paying for the stock so allotted to him, and the money paid therefor was used for the benefit of the corporation, held, that an assignee of a portion of the director's shares, taking the same without knowledge of their illegality, was entitled to hold it; that it would be inequitable to cancel the new stock in the hands of the director after the corporation had received the benefit of the payment, but that it was proper to continue a preliminary injunction restraining him from voting, selling or disposing of it.[47]

De facto officers may represent their corporation in suits for

(43) Hall *v.* West Chester Pubg. Co., 180 Pa., 561 (1897).
(44) Zion's Church *v.* Light, 7 Pa. Super. Ct., 223 (1898).
(45) York County *v.* Small, 1 W. & S., 315 (1841).
(46) D. & H. Canal Co. *v.* Penna. Coal Co., 21 Pa., 131 (1853).
(47) Morris *v.* Stevens, 178 Pa., 563 (1896); 17 Pa. C. C., 209.

or against the same,[48] and sell or lease the property of the company as fully as de jure officers may do so.[49]

If a corporation omit to continue the succession to certain offices which constitute an integral part of the body, but these offices be supplied with officers de facto, it is sufficient to sustain the existence of the corporation as to strangers, and to enable it to maintain a suit.[50]

151. Compensation of Officers.

An officer of a corporation may not receive any compensation for the performance of an official duty, except by express contract preceding the rendering of the services.[51]

Directors are not entitled to any compensation for their official services as directors, unless compensation is provided for by the charter or by by-laws adopted by a majority of the stockholders or directors, and such compensation must be provided for before the services are rendered. A resolution by a corporation after the services have been rendered that the directors shall be paid a certain sum for antecedent services is without consideration and void.[52] Of course after the passage of a resolution fixing the salaries of officers or directors they may receive them from the date of resolution.[53]

When stock has been issued to directors for services, without precedent authority for payment therefor, a person taking the stock with full knowledge of the transaction is not a bona fide purchaser for value without notice, and he cannot compel the corporation to transfer the stock to himself.[53*]

The action of a board of directors electing a president at a salary to be fixed afterward by the president and a stockholder, the

(48) Woodward *v.* Church, 14 W. N. C., 240 (1884).

(49) Kersey Oil Co. *v.* Oil Creek and Alleg. Riv. R. Co., 5 W. N. C., 144 (1877).

(50) Lehigh Bridge Co. *v.* Lehigh Coal & Nav. Co., 4 Rawle, 9 (1833).

(51) Brophy *v.* Amer. Brewing Co. of Phila., 211 Pa., 596 (1905); Danville, Wilkes-Barre & H. R. Co. *v.* Kase, 41 W. N. C., 411 (1897); Kilpatrick *v.* Penrose Ferry Bridge Co., 49 Pa., 118 (1864); Field *v.* Union Box Co., 2 W. N. C., 426 (1876).

(52) Martindale *v.* Wilson-Cass Co., 134 Pa., 348 (1890); Loan Assn. *v.* Stonemetz, 29 Pa., 534 (1858); Grafner *v.* Pgh. N. I. & C. Ry. Co., 207 Pa. 217, (1903).

(53) McGowan *v.* Lincoln Park & S. S. Consol. Co., 181 Pa., 55 (1897).

(53*) Grafner *v.* Pgh., N. I. & C. St. Ry. Co., 207 Pa., 217 (1903).

two holding nearly all the capital stock, is, however, such an exercise of authority of the board as will support an express contract for the salary, binding upon the corporation, but to recover the amount of the salary the plaintiff must show that it was afterwards fixed in pursuance of said reference and subsequently adopted and ratified by the directors. Such adoption or ratification, however, may be inferred from acts done or permitted, and need not be proved by a recorded resolution.[54]

The president of a corporation cannot sustain a claim for an increase of salary, when the same was secured by means of his own vote as a member of the board allowing it, against the protest of a minority of the board of directors.[55]

Where an officer of a corporation which has made an assignment for the benefit of creditors, has performed or has been ready to perform the duties of his office, he is entitled to compensation for the unexpired portion of his term during which the property was in the hands of the assignee. Where, however, the treasurer holds over, without a re-election, while the property of the company is in the hands of the assignee, the presumption is against his right to recover; but if, in fact, services were rendered by him while so holding over, such services were evidence of his continuance in office, and of a consequent right to recover the salary therefor; and evidence of those services may be submitted to the jury.[56]

Where a corporation has forfeited its charter and a receiver has been appointed, a claim by its manager for services rendered and money loaned after the date of forfeiture cannot be allowed as against the receiver. The contract relation is terminated by the dissolution of the corporation.[57]

The secretary of a private corporation, having a fixed salary, cannot recover extra pay for services rendered in that capacity. The fair construction of his contract is, that he will do whatever his employers may have occasion to employ a secretary about.[58] And where a resolution of the board of directors provides that

(54) Bagaley *v.* Pgh. etc. Iron Co., 146 Pa., 478 (1891).

(55) Schaffhauser *v.* Arnholt & Schaefer Brewing Co., 218 Pa., 298 (1907).

(56) Potts *v.* Rose Valley Mills Co., 167 Pa., 310 (1895).

(57) Loucheim *v.* Clawson Printing & Weighing Co., 12 Pa. Super. Ct., 55 (1899).

(58) Carr *v.* Chartiers Coal Co., 25 Pa., 337 (1855).

a certain salary shall be paid the secretary of the company until a certain date, the secretary cannot recover for services rendered after said date.[59]

Where a person was elected secretary of a corporation to serve for a year, his salary being fixed by a resolution passed at the same meeting at $2,500 per annum, but subsequently fixed at $30 per week, the contract will be construed to be a hiring for a year.[60]

Where the creditors of a corporation agreed to an extension of time under an agreement that the business of the company should be conducted for a certain period by a committee of three practical steel and iron men, to be selected by the creditors, held, that the members of such committee might recover from the corporation in a joint action for compensation for their services.[61]

Witness fees and mileage will be allowed to an agent or officer of a corporation in a suit against it, and the cost of taking the testimony of an agent or officer by a corporation by a commission will be allowed as part of the costs.[62]

A commission to directors of one-third of the stock of an insurance company for selling the other two-thirds is unconscionable, and every director voting for the resolution purporting to authorize the payment of such a commission, and receiving a part of the stock in pursuance thereof, is liable to the company and its assignee for the benefit of creditors for the full value of all the stock issued under such resolution, less the amount actually paid for the stock.[63]

An officer is not deprived of his right to a reasonable compensation by a finding that the amount fixed for his salary is excessive.[64]

To entitle the president of a corporation to recover for salaries he paid to other persons employed by him in the service of the company, it must be found that the employment and services rendered were known, adopted and ratified by the board of directors,

(59) Place *v.* Lansdale etc., Tpk. R. Co., 8 Montg. Co. Rep., 63 (1892).

(60) Phila. Packing & Provision Co.'s Estate, 4 D. R., 57 (1894).

(61) Dallas *v.* Columbia Iron & Steel Co., 158 Pa. 444 (1893).

(62) Sattler *v.* Aultman & Taylor Mach. Co., 9 D. R., 73 (1900). See McFarland *v.* Ligonier Valley R. R. Co., 42 Leg. Int., 56; Wilson *v.* Mutual Fire Ins. Co., 1 Pa. C. C., 11 (1885); Skinner Engine Co. *v.* Webb, 5 Pa. C. C., 480 (1888); Sharpless *v.* Pikeland Creamery, Ld., 1 Pa. C. C. 42 (1885).

(63) Freeman *v.* Stine, 15 Phila., 37 (1881).

(64) Miller *v.* Doyle, 211 Pa., 59 (1905).

but such action may be inferred from their acts, and need not be proven by the minutes.[65] A corporation whose president is authorized to transact its business generally, may not refuse to pay persons employed by him upon the ground that he acted as a contractor, under secret instructions, in employing them, and not as the agent of the company.[66]

The election of a treasurer of a corporation to serve for the ensuing year and the fixing of his salary at a certain sum per month with a provision for an increase and a substitution of weekly instead of monthly payments constitute a contract of hiring by the year; and the insolvency of the corporation does not end its obligation to pay the salary.[67]

Under a by-law which provides that "No director, as such, shall receive any salary for his services, but this is not to be construed to preclude any director from holding any other office in the company and receiving compensation therefor, or performing any special services for which compensation may be allowed, provided that no director shall be chosen to any office for which compensation is allowed or such compensation be fixed, except by a majority of the whole number of directors," a resolution, creating certain salaried offices other than those existing under the charter and by-laws, and electing members of the board thereto, is invalid, unless passed by a majority of the whole number of directors, without counting the votes of those members of the board who were elected to the offices under the resolution.[68]

Where a corporation elects a solicitor and subsequently adopts a resolution "that the solicitor's salary shall begin when he is notified that his services are required by the company," and the solicitor accepts but no notice that his services are required is ever given him, he cannot recover any salary.[69]

152. Powers of Officers as to Execution and Endorsement of Promissory Notes.

Corporations have the implied power of executing promissory notes.[70]

(65) Bagaley *v.* Pgh. etc. Iron Co., 146 Pa., 478 (1891).
(66) Grafius *v.* Land Co., 3 Phila., 447 (1859).
(67) Hassenfus *v.* Phila. Packing & Provision Co., 15 Pa. C. C., 650 (1895).
(68) Bergdoll *v.* The Bergdoll Brewing Co., 10 D. R., 173 (1901).
(69) Fitzpatrick *v.* Lincoln Savings and Trust Co., 194 Pa., 544 (1900).
(70) McMasters *v.* Reed's Executors, 1 Grant, 36 (1854).

The treasurer of a corporation may not sign or endorse in the name of his corporation, unless authorized by the by-laws or the directors or the stockholders. A note signed by the treasurer of a corporation and without the signature of the president, as required by the by-laws, is not binding on the company, if the company has received no benefit from the note, and if no practice is shown of such notes being honored by the corporation.[71]

And where the president of a bank accepts for discount notes of a corporation, knowing them to have been executed in fraud of the corporation, the bank is estopped from asserting that the notes were issued in the exercise of an apparent authority in the treasurer to issue notes, because the corporation had long honored notes executed by him, without objection.[72]

A promissory note containing the words "we promise to pay," and with a stamp bearing the name of the corporation, with the words "M. S., Treasurer," standing immediately beneath the corporate signature, does not, on its face, evidence a personal liability by M. S.;[73] and the president of a corporation who endorses as president a promissory note given to the corporation and passes it in payment of a corporate debt, is not personally liable upon his endorsement to the endorsee.[74]

Where the president of a corporation endorses a promissory note, adding the word "president" after his name, but not designating the company of which he is president, the endorsement would not have bound the company as to strangers, but will as to the original endorsee who has knowledge that the endorsement was intended as a contract of the corporation.[75]

B, treasurer of a corporation, drew a note in blank and obtained the endorsement of the president of the corporation, who declined to endorse as an individual, but did endorse affixing

(71) Millward Cliff Cracker Co.'s Estate, 161 Pa., 157 (1894); Atlantic Refining Co. *v.* Mengel & McKelvy, 6 D. R., 273 (1897). But see Mechanics' Nat. Bank *v.* W. Phila. Pass. Ry. Co., 5 W. N. C., 290 (1878), and Gunster *v.* Scranton Illg. H. & P. Co., 181 Pa., 327 (1897). It was held in the last named case that the making of corporate notes was within the authority of the treasurer. When a note is executed by a treasurer as such pursuant to a resolution of the board of directors, it is, of course, the note of the corporation. Rudy *v.* Bridgeport Gas Co., 4 Walk., 370 (1884).

(72) Millward-Cliff Cracker Co.'s Estate, 161 Pa., 157 (1894).

(73) Williams *v.* Hipple, 17 Pa. Super Ct., 81 (1901).

(74) Seyfert *v.* Lowe, 7 W. N. C., 39 (1879).

(75) Seyfert *v.* Lowe, 7 W. N. C., 39 (1879).

"pres't" to his name. The note was afterwards filled up with the name of C, a creditor of the corporation, as payee, and the amount, and the word "pres't" was erased by B. It was then handed to C, who had no knowledge of the erasure, but knew that A was president of the company, in payment of the debt due by the company, and was receipted for. Held, that under the circumstances A was not personally liable, but that if C had been a stranger to A, and the latter's connection with the company unknown to him, the addition of the word "pres't" after his name, in the absence of anything on the face of the note to indicate his endorsement of it in a representative capacity, would not be a restrictive endorsement.[76]

The secretary of an incorporated company who, as such, signs a lottery ticket for the company is not personally responsible to the holder.[77]

Where, in the body of a sealed instrument, the covenants are stated as if they were made by the corporation directly with the plaintiff, without the agency of any one, and the defendant is not named but signs the instrument and seals it with his own seal as president of the corporation, and on its behalf, an action cannot be maintained against him upon it, individually.[78]

A construction company which had received full consideration for its contract with a railroad company gave a note in payment for materials used by it in carrying out its contract, which note was endorsed by the president of the railroad company, without authority of any by-law or action by the board of directors. Held, that the payee plaintiff, having taken the note without inquiry as to the president's authority, must be deemed in law to have taken it with notice. Such a case does not come within the rule that when a corporation receives and retains the benefits of an unauthorized act it is ordinarily estopped from pleading such lack of authority.[79]

Where a note has been given to provide the original cash capital of a corporation, it is immaterial whether the cash was to be raised by the discount of the note by a bank, or by holding it as

(76) Sharpe v. Bellis, 61 Pa., 69 (1869).

(77) Passmore *v.* Mott, 2 Binn., 201 (1809).

(78) Hopkins *v.* Mehaffy, 11 S. & R., 126 (1824).

(79) Worthington *v.* Schuylkill Elec. Ry. Co., 10 Pa. Super. Ct., 117 (1899).

indemnity for cash subscriptions. The difference is in name only, and the signers of the note are liable either as makers or indemnifiers.[80]

The trustees of a church have an implied power to borrow money for repairs to the church building, and a promissory note given by them for such borrowed money in the name of the corporation is admissible in an action against the latter for the sum so borrowed. Although in the absence of an express provision in the charter the trustees cannot bind the society by such a note, yet, the construction of a meeting house being one of the legitimate purposes of the society, there is an implied power to borrow money therefor, and the plaintiffs may recover under a count for money had and received.[81]

153. Declarations, Admissions and Confessions of Officers.

Confessions of the trustees of a corporation made after the acts to which they relate have been performed are not binding on the corporation.[82]

Declarations of the officers of a corporation as to action taken by the board of directors are not evidence against the corporation, unless the board authorizes the same.[83]

Declarations by a person who has been president of a bank, but who was not a party to the suit, respecting payments made on a note, held, not to be evidence against the bank.[84]

Whether or not evidence of the president of a corporation as to an agreement made by him is admissible, depends upon whether, in making such agreement, he acted within the scope of his authority. Some evidence ought to be given as to such authority, to lay the grounds for admitting his acts or declarations as obligatory on the company.[85]

The admissions of the president of a bank who was also its special agent, of his acts done in the course of his agency, are evidence against the bank.[86]

(80) Penn. Safe Dep. & T. Co. *v.* Thomas, 4 D. R., 421 (1891).
(81) First Bap. Church *v.* Caughey, 85 Pa., 271 (1877).
(82) Magill *v.* Kauffman, 4 S. & R., 317 (1818).
(83) Stewart *v.* Huntingdon Bank, 11 S. & R., 267 (1824).
(84) Sterling *v.* Marietta & Susquehanna Trading Co., 11 S. & R., 179 (1824).
(85) Farmers' Bank of Bucks Co. *v.* McKee, 2 Pa., 318 (1845).
(86) Spalding *v.* Bank of Susquehanna County, 9 Pa., 28 (1848).

The declarations of the cashier of a bank of his knowledge that certain stock which stood upon the books of the bank in the name of a certain individual was a trust fund invested for the benefit of others, may be given in evidence, under certain circumstances, to charge the bank with knowledge of the fact.[87]

In cases of alleged tortuous conduct, such as negligence, it is imperative, unless the act is specially authorized, that the admissions of agents and officers be part of the res gestae, otherwise they are hearsay.[88]

Declarations of the secretary of a corporation as to the amount due on a mortgage held by it, are not admissible in evidence in a suit on the mortgage unless it be shown that the secretary had authority to bind the corporation by such admissions. It is not sufficient to show that, as secretary, he had charge of the books and accounts of the corporation.[89]

154. When Notice to an Officer is Notice to the Corporation.

Knowledge of the dissolution of a firm, imparted to the board by a director at a regular meeting, is notice to the corporation.[90]

Knowledge of the consulting engineer of a corporation that the contractors for the construction of a bridge are innocently omitting certain things, is notice to the company.[91]

Notice to a director who is not constituted the organ of communication between the parties that a promissory note was made to be discounted for a special purpose, is not notice to the bank discounting the note, though the director was present when the note was discounted.[92]

Notice to a stockholder is not notice to the corporation.[93]

The knowledge of an officer of a corporation which will affect the corporation with constructive notice, must be gained by the

(87) Harrisburg Bank *v.* Tyler, 3 W. & S., 373 (1842).

(88) Oil City Fuel Supply Co. *v.* Boundy, 122 Pa., 449 (1888); Bigley *v.* Williams, 80 Pa., 107 (1876); Baker *v.* Allegheny Valley R. Co., 95 Pa., 211 (1880); Amer. S. S. Co. *v.* Landreth, 102 Pa., 131 (1883); Lombard St. etc. Pass. Ry. Co. *v.* Christian, 124 Pa., 114 (1889).

(89) Johnston *v.* Elizabeth B. & L. Assn., 104 Pa., 394 (1883).

(90) Bank of Pgh. *v.* Whitehead, 10 Watts, 397 (1840).

(91) Danville Bridge Co. *v.* Pomroy, 15 Pa., 151 (1850).

(92) Caster *v.* Tompkins County Bank, 9 Pa., 27 (1848).

(93) Union Canal Co. *v.* Loyd, 4 W. & S., 393 (1842); Bank of Pgh. *v.* Whitehead, Sproul & Company, 10 Watts, 397 (1840).

officer while acting for the corporation in the matter to which it relates.[94]

Knowledge derived by the president of a corporation in the execution of an unlawful contract will not be imputed to the corporation by reason of his general agency, and ratification will not be implied from such knowledge.[95]

155. Same Subject Continued.

Where an officer of a corporation commits a fraud on his own account and in his own favor, he cannot be presumed to have communicated the same to the corporation, and hence it will not be bound by his knowledge of the fraud as between itself and a bank in which the corporation makes its deposits, and which has paid money on a corporation cheque, the endorsement of which has been forged by said officer.[96]

156. Proof of Appointment of Officers.

If no evidence be given of a written appointment of a cashier, evidence is admissible to show that the person alleged to be cashier acted as such in the performance of various duties of that office, and though a resolution of the board of directors directing the cashier to require certain moneys to be paid to him at the banking house on or before a certain day is not evidence per se, yet, connected with other testimony, it is evidence of his appointment.[97]

157. Managers of Corporations.

Where a corporation places a person in charge of its general business in a particular city as manager or general agent, and holds him out by signs and other means as such manager or general agent, the corporation is liable on a contract made by him in the ordinary course of business, as business was conducted by him at the particular time and place.[97*]

Where the general manager of a corporation, with extensive powers, sells in good faith and to the interest of the company a

(94) Sitler *v.* Spring Garden Mut. Fire Ins. Co. etc., (No. 1), 18 Pa. Super. Ct., 139 (1901).

(95) Bangor & P. R. Co. *v.* Slate Co., 8 North., 141 (1902); 203 Pa., 7 (1902).

(96) United Security Co. *v.* Central Nat. Bank, 42 W. N. C., 145 (1898).

(97) Barrington *v.* Bank of Washington, 14 S. & R., 405 (1826).

(97*) Empire Implement Mfg. Co. *v.* Hench, et al., 219 Pa., 135 (1907).

portion of its assets, which sale is known to its officers, and is never afterwards questioned or disaffirmed by any corporate action, an assignee for the benefit of creditors cannot repudiate the agreement and recover back the property without restoring the consideration, merely because the stockholders did not by vote authorize such sale.[98] A manager of a corporation may not employ a broker.[99]

The superintendent or general manager of a steel company has no power to bind the corporation by a contract to pay an injured employe what would practically be a pension for life, in consideration of the employe agreeing not to sue the company.[99*]

The manager of a corporation is not liable for the price of goods which he purchases for it even though he knew at the time of the purchase that it was insolvent.[99**]

The manager of an incorporated association cannot confess judgment without authority from the board of directors.[100]

158. President.

The general rule is, that the president of a corporation cannot act or contract for the company any more than any other one director, his proper duties being confined to presiding and voting as a director, except where he is invested by the by-laws or board of directors with other powers, or where a course of dealing exists with the knowledge of the corporation from which the possession of other powers may be inferred.[1]. In practice he usually is invested with various powers in the management of the affairs of the company, but in the exercise thereof he acts as the agent of the company or its directors, and not primarily in his capacity as president.

When the president of a company has been in the habit of acting as its business agent, with its knowledge and without objection, making sales, settling accounts and collecting debts, actual authority may be inferred from such acts, and the company will

(98) Penna. Oil Co. *v.* Pure Oil Co., 195 Pa., 388 (1900).
(99) Allegheny etc. Co. *v.* Moore, 95 Pa., 412 (1880).
(99*) Smith *v.* Crum Lynne Iron & Steel Co., 208 Pa., 462 (1904).
(99**) North Amer. Smelting Co. *v.* Temple, 12 Super. Ct., 99 (1899).
(100) Freeman *v.* Plain Dealer Printing Co., 9 Luz. Leg. Reg., 37
(1) Fisher *v.* Harrisburg Gas Co., 1 Pearson, 118 (1857); Cook on Corpns., Sec. 716.

be bound by them.[2] But the implied powers of the president or agent of a corporation must be considered in connection with the usual and legitimate business of such corporation.[3]

Where all the stockholders, directors and officers of a corporation give their consent in writing to the making of a contract by the president, the corporation is estopped from pleading a want of power in him.[4]

Where a by-law gives the president of a corporation "the general charge and direction of the business of the company as well as all matters connected with the interests and objects of the corporation," this does not include authority to do an act which by another by-law is expressly given to a separate committee.[5]

Where the question raised by an affidavit of defense is simply the authority of the president of a corporation to increase the plaintiff's salary without authority of the board of directors and without notice to them, the case is for the jury.[6]

It seems that the giving of information by the president of a corporation as to the status of such company is outside of the line of his duty, so that the corporation cannot be held liable for the giving by him of false information of that nature,[7] and a land company is not bound by the unauthorized representations of the president of the company to a purchaser at a private sale of a lot, in its plan, to the effect that a portion of the land in said plan is to be reserved as a public park.[8]

The president of a slate company has no inherent authority to bind it by a contract to ship all its productions in a certain way or by a certain line, nor does authority given him to raise money for the company upon mortgage imply authority to make such a contract as an incident of the loan. Acceptance of benefits resulting from the unauthorized action of an agent will not raise an estoppel, unless done with notice or knowledge on the part of the principal.

(2) Dougherty *v.* Hunter, 54 Pa., 380 (1867).

(3) Wright's Appeal, 99 Pa., 425 (1882).

(4) Sanderson *v.* Imperial Underwear Company, 15 D. R., 695 (1905).

(5) Twelfth Street Market Co. *v.* Jackson, 102 Pa., 269 (1883), reversing 12 W. N. C., 190 (1882).

(6) Mesick *v.* United Collieries Co., 15 Pa. Super. Ct., 316 (1900). See dissenting opinion of Rice, C. J., and Porter, J.

(7) Investment Co. of Phila. *v.* Eldridge, 175 Pa., 287 (1896).

(8) Jones *v.* Yoder Land Co., 16 Pa. C. C., 652 (1895).

Knowledge by the president of a corporation acquired in another transaction is not notice to the corporation.[8*]

Where the president of a brewing company is also a director of a trust company, the trust company may not, by reason of this sole fact, and without evidence of fraud or collusion, be held liable to the brewing company for a loss resulting to the latter from the misfeasance of its president.[9]

Where a contract of an apparently disadvantageous nature for a corporation is executed by its president and secretary under the seal of the corporation, and the validity of the contract is questioned by the stockholders, the burden is on the other contracting party to show that the said officers had either express or implied power from the board of directors to execute it, or that it was subsequently ratified by the board, or its benefits subsequently enjoyed by the corporation with notice.[10]

159. Estoppel to Deny Authority of President.

Where a corporation benefits by the unauthorized acts of its president, it is estopped to deny his authority to perform the same,[11] and where a course of dealing by the president with a third person is shown, sufficient to create an implied authority, the corporation may not plead lack of authority,[12] nor set up that an act within the president's authority was performed contrary to private instructions.[13]

Where there is a subsequent ratification of the president's acts, either express or implied, the corporation is bound,[14] but the ratification must be with full knowledge of all the essential facts in the case.[15]

(8*) Bangor & Portland Ry. Co. *v.* Amer. Bangor Slate Co., 203 Pa., 6, (1902).

(9) Elk Brewing Co. *v.* Neubert, 213 Pa., 171 (1906).

(10) Patton *v.* Ligonier Coal Co., 12 D. R., 456 (1903).

(11) Goldbeck *v.* Kensington Nat. Bank, 147 Pa., 267 (1892); 10 Pa. C., C., 97; Auffmordt *v.* Volgler, 5 D. R., 261 (1896); Penn. Nat. Gas Co. *v.* Cook, 123 Pa., 170 (1889).

(12) Mechanics' Nat. Bank *v.* W. Phila. Pass. Ry. Co., 5 W. N. C., 290 (1878).

(13) Grafius *v.* Land Co., 3 Phila., 447 (1859).

(14) Bagaley *v.* Pgh. & L. S. Iron Co., 146 Pa., 478 (1892); Camden & Atlantic R. R. Co. *v.* Coxe, 18 W. N. C., 20 (1886); Dallas *v.* Columbia Iron & S. Co., 158 Pa., 444 (1893); Richardson *v.* Amer. etc. Sewing Machine Co., 1 Leg. Gaz., 206 (1868).

(15) Twelfth Street Market Co. *v.* Jackson, 102 Pa., 269 (1883).

160. The President of a Corporation May.

Contract for the lease of an office for the use of his corporation, and his declarations at the time of contracting as to the purpose for which the lease was taken are admissible.[16]

Pledge the personal property of his corporation to secure borrowed money, when he is authorized by the by-laws to borrow money and transact the business of the corporation.[17]

Accept conditional subscriptions for stock.[18]

In good faith loan his company money necessary for its use, take and enforce a note given as security for a loan, and, at judicial sale of the company's property, purchase it for his own benefit.[19]

Bind his bank by an agreement with an endorser that the maker of the note shall give a note, and that the endorser shall not be held liable.[20]

Employ counsel to defend an action against his corporation and bind it for reasonable compensation to the attorney.[21]

161. The President of a Corporation May Not.

Sell goods, unless specially authorized, or he has made similar sales without objection by the company.[22]

Employ brokers to discharge an existing ground rent when that duty is imposed by the by-laws on the directors.[23]

Bind his bank (a National bank) by the purchase of stocks and bonds for it.[24]

Bind the company, without authority of or ratification by the board of directors, to make compensation to an agent for securing customers to buy the stock of the company.[25]

Assign the property or franchises of his corporation; nor can

(16) Steamboat Co. *v.* McCutcheon, 13 Pa., 13 (1850).

(17) Quaker City Nat. Bank *v.* Gilkeson, 18 Pa. C. C., 557 (1896).

(18) Pgh. & C. R. R. Co. *v.* Stewart, 41 Pa., 54 (1861).

(19) Law *v.* Fuller, 217 Pa., 439 (1907).

(20) Cake *v.* Pottsville Bank, 116 Pa., 264 (1887).

(21) Campbell *v.* Pgh. Bridge Co., 23 Pa. Super. Ct., 138 (1903). *Contra* Allegheny Workhouse *v.* Moore, 95 Pa., 408; Citizens' Bank *v.* Keim, 32 Leg. Int., 90 (1875); First Nat. Bank *v.* Hoch, 89 Pa., 324 (1879).

(22) Pgh. Melting Co. *v.* Reese, 118 Pa., 355 (1888).

(23) Twelfth St. Market House Co. *v.* Jackson, 102 Pa., 629 (1883). See Allegheny Work House *v.* Moore, 95 Pa., 408 (1880).

(24) First Nat. Bank *v.* Hoch, 89 Pa., 324 (1879).

(25) Clarkson *v.* Keystone Oil Cloth Company, 23 Pa. C. C., 189 (1899).

the company of which he is president be deprived by equitable estoppel arising from his acts of property or rights which he could not, as president, convey by his direct act.[26]

Confess judgment so as to bind the corporation, without authority of the board of directors or of a provision in the charter or by-laws authorizing the same.[26*]

Contract to ship all the products of the company in a certain way or by a certain line.[26**]

The president of a corporation whose power to contract in its name is limited by the by-laws, cannot execute an agreement in the nature of a perpetual covenant without authority from the board of directors, and the covenantee is bound to inquire into the extent of such president's authority.[27]

Contract to pay a commission to an agent for securing subscriptions to the capital stock of his company, and the fact that the corporation received the benefit creates no liability where the benefit was received without knowledge.[27*]

162. Authority Conferred Upon the President May Not be Exercised By a Mere Director.

Where authority to bind a company by a contract was given to its president, or in his absence to the vice-president, a mere director cannot exercise the power thus limited to the designated officers.[28]

163. Treasurer.

The treasurer of a corporation may not set off a debt or independent claim when sued for the money in his hands. He received the funds he held at the order of the corporation as their officer, and without such order he cannot pay or appropriate them either to himself or others. There is fairly to be implied from the relation he sustains an undertaking not to plead a set-off, but to account for and pay over whatever money came to his hands in that character.[29]

(26) Princeton R. R. Co. *v.* Penna. R. R. Co., 2 W. N. C., 277 (1868).

(26*) Livezey *v.* Qualey, 14 Montg. Co., 205 (1898).

(26**) Bangor & P. Ry. Co. *v.* Amer. B. S. Co., 203 Pa., 6 (1902).

(27) Bangor & P. Ry. Co. *v.* Amer. B. S. Co., 203 Pa., 17 (1902).

(27*) Clarkson *v.* Keystone Oil Cloth Co., 8 D. R., 593 (1899).

(28) Gaynor et al. *v.* Williamsport North Branch R. R. Co., 189 Pa., 5 (1899).

(29) Russell *v.* First Presb. Church, 65 Pa., 9 (1870), and cases cited.

A shareholder in a beneficial association gave her cheque to the treasurer of the association for advance dues. He endorsed the cheque and embezzled the proceeds. The by-laws required that dues should be paid only at regular, weekly meetings of the directors, when the secretary should receive the money, give proper credit and hand the money to the treasurer. Held, that the cheque being payable to the order of the association and endorsed by the treasurer, who was the proper person to endorse it, the payment was an actual and legitimate payment to the company.[30]

The treasurer of a corporation may accept bills of exchange drawn on his company.[31]

The treasurer of an insolvent corporation executed, before the general assignment of the company, the following paper: "R hereby assigns to C. & Co. all money due or to become due by M. & Co. for goods consigned by R. to M. & Co., or from any other source. It did not appear that the treasurer had any authority to execute the paper, but the corporation had knowledge of it and never repudiated it. Held, that this was sufficient evidence of a ratification of the assignment.[31*]

When the treasurer of a corporation issues a certificate that certain bonds have been loaned to the company, which afterwards sells the bonds and appropriates the proceeds, it is estopped from setting up the want of authority of the treasurer to bind the company by the certificate.[31**]

The treasurer of a corporation, who was also the vice-president of a bank in general charge of the bank's affairs, made two promissory notes, signing them with the name of the corporation followed by his own name as treasurer. The notes were discounted by the bank and credit given the corporation. On the same day as treasurer, he drew a cheque "to order of Dft., N. Y.," signing it with the name of the corporation and his own name as treasurer. The amount of the cheque was charged to the corporation on the books of the bank. He also, on the same day, in payment of said cheque, as vice-president of the bank, drew two drafts upon New York, to his own order, signing them with his

(30) Strong *v.* Ten Cent Tutor B. & L. Assn., 189 Pa., 406 (1899).
(31) Hanson *v.* R. R. Co., 1 W. N. C., 7 (1874).
(31*) Cooper *v.* Potts, 185 Pa., 115 (1898).
(31**) Callendar *v.* Kelly, 190 Pa., 455 (1899).

own name as vice-president of the bank. He received payment of the draft in currency which he used for his own purposes. The bank sued the corporation on the promissory notes. Held, that as the notes and cheque were made by the treasurer of the corporation as such, and as such acts were within his authority, the corporation was liable for the loss, and the bank might recover on the notes.[32]

A treasurer may make a valid call for stock subscriptions, when he has general authority from the board of directors so to do.[33] He has no power to indefinitely extend the time of the payment of a subscription to the stock of his company.[34]

His acts in excess of his authority, like those of any other officer or agent, may be ratified by the corporation.[35]

Where two agricultural societies agreed to hold a joint fair and the treasurer of one society sued the treasurer of the other to recover half the net proceeds of the same, it was held to be a good affidavit of defense that there had never been a settlement between the two societies, that the defendant was not a party to the contract, and that he had received the money as treasurer of his own society and had paid it out in accordance with the rules of and as directed by that society.[36]

The treasurer of an assocation, who receives no compensation, is a gratuitous bailee, and is only liable for gross negligence in paying out funds.[37]

One person may be the treasurer of two corporations doing business with each other, but this in no wise changes the relations, duties or liabilities of the two corporations which are the same as if different persons had been their treasurers.[38]

When the treasurer of a corporation distributes money of the company to himself and other stockholders without any authority from the board of directors, no dividend having been declared, he is personally liable to the corporation therefor.[39]

(32) Gunster *v.* Scranton Illg., Ht. & Pr. Co., 181 Pa., 326 (1897).
(33) Hays *v.* Pgh. & Steubenville R. Co., 38 Pa. 81 (1860).
(34) McComb *v.* Credit Mobilier, 5 W. N. C., 80; 13 Phila., 468 (1878).
(35) Harmony Bldg. Assn. *v.* Goldbeck, 13 W. N. C., 24 (1883).
(36) Pa. State Agr. Society *v.* Jermyn, 167 Pa., 359 (1895).
(37) Hibernia Bldg. Assn. *v.* McGrath, 154 Pa., 296 (1893).
(38) Elk Brewing Co. *v.* Neubert, 213 Pa., 171 (1906).
(39) Cheat Valley R. R. Co. *v.* Humes, 211 Pa., 287 (1905).

164. Cashier.

The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object and to do anything in relation thereto that an attorney might lawfully do; but his authority would not justify him in altering the nature of the debt, or to change the relations of a bank from a creditor to that of an agent of its debtor; but a subsequent acquiescence by the bank in any arrangement of its cashier would be conclusive upon it.[40]

The cashier of an incorporated bank is the general executive officer to manage its concerns in all things not peculiarly committed to the directors. He is the agent of the corporation and not of the directors.[41]

It is not necessary in order to bind a bank that notice of the cashier's act shall be given to the directors when acting officially. If personally cognizant of it, they should assemble the board and disavow the cashier's act if unwilling to be bound by it.[42]

A cashier in a private bank may indorse paper after banking hours.[43]

165. Individual Liability of Officers.[44]

166. Joinder of Officers.

In a bill of discovery in aid of executions against a corporation the officers may properly be joined in the bill, and it is good practice to join and describe them therein by their official designation, and in their official capacity.[45]

167. Miscellaneous.

An officer of a corporation covenanted with a creditor thereof, on behalf of the corporation and himself, with a certain condition that the company should not create a lien. He afterwards obtained judgment against the corporation. Held, that this was a breach of his covenant and his judgment was postponed to the claim of the creditor.[46]

(40) Bank of Pa. *v.* Reed, 1 W. & S., 101 (1841).
(41) Bissell *v.* First Nat. Bank of Franklin, 69 Pa., 415 (1871).
(42) Kelsey *v.* National Bank, 69 Pa., 426 (1871).
(43) Bissell *v.* First Nat. Bank, 69 Pa., 415 (1871).
(44) See Secs. 190 and 191.
(45) First Nat. Bank *v.* Patterson, 31 W. N. C., 503 (1893).
(46) Stoltz's Appeal, 2 Walker, 282 (1881)

When an officer is entrusted with bonds and shares of stock of his company in order to raise money on them for the construction and equipment of the company's road, which bonds and stock have at the time no market value, and he afterwards, by virtue of resolutions of the board of directors, takes the securities to himself and undertakes to construct and does construct the road, in the proceedings to compel him to account for the application of the securities to the construction, he is required to account for them at their actual value when taken, and not at their face value.[47]

A corporation is not responsible for a libel published by one of its officers.[48]

If the officers of a corporation improperly answer or fail to answer interrogatories in an attachment execution, an attachment for contempt may be issued against them.[49]

A court will not, on the petition of a majority of the members of an incorporated religious society, award a mandamus to compel the trustees of such society to affix their common seal to alterations and amendments to their charter contrary to their own judgment.[50]

Where a corporation received the benefit of money borrowed on a corporate mortgage, and the stockholders know of it and make no objection within a reasonable time to the lack of authority in the corporate officers to make the loan, neither the corporation, its stockholders nor its creditors can set up such want of authority in a suit on the mortgage, nor can the receiver of the company do so for them.[51]

The charter of a corporation provided that its property should be purchased and held by a board of five trustees. A mortgage for the purchase money of the land, executed by its president and secretary, without the corporate seal and unauthorized and unratified by any corporate resolution, was held invalid against the corporation.[52]

A judgment entered against a corporation by virtue of a war-

(47) Danville, Hazleton & Wilkes-Barre R. Co. *v.* Kase, 41 W. N. C., 411 (1897).

(48) Henry *v.* Pgh. & L. E. R. R. Co., 139 Pa., 289 (1891).

(49) Carondelet Co. *v.* Fairmount Ins. Assn., 15 W. N. C., 125 (1884).

(50) Com. *v.* St. Mary's Church, 6 S. & R., 508 (1821).

(51) Manhattan Hardware Co. *v.* Phalen, 128 Pa., 110 (1889).

(52) McElroy *v.* Nucleus Assn., 131 Pa., 393 (1889).

rant of attorney signed by the treasurer, a director and general manager of a corporation, unauthorized by the board of directors, will be set aside.[53]

Where it appeared that a creditor knew that he was lending money to an officer of the company for his individual use, and that said company received no consideration therefor, the equities between the creditor and the shareholders of the company must be determined against the creditor.[54]

AGENTS.[55]

168. Liability of Corporation for Acts of.

When a person has been in the habit of acting as the business agent of a corporation, with its knowledge, and without objection, actual authority may be inferred from his acts and the company will be bound by them.[56]

The authorized shipping clerk of a railroad company at a certain station issued a bill of lading in the company's name for certain goods that the company had never received, which bill came to the hands of an innocent holder for value. Held, that the company was estopped from denying the receipt of the goods, though the clerk had no authority to issue bills of lading without receiving the goods, and though the company had never done anything to lead any one to suppose that he had such authority.[57]

As a general rule when a corporation entrusts a principal officer or manager with the general supervision of a particular branch of its business, it clothes such officer or manager with the authority of a general agent, coextensive with the business entrusted to his care, and private instructions limiting his ostensible powers will not protect the corporation from liability for the acts of the agent done within the scope of his ostensible authority, although the specific act may be in excess of private instructions.[57*]

The maxim *omnia presumuntur rite esse acta* applies to acts

(53) Jackson *v.* Cartwright Lumber Co., 2 D. R., 680 (1893).

(54) Culver *v.* Reno Real Estate Co., 91 Pa., 367 (1879).

(55) See Sec. 146.

(56) Culver to use *v.* Pocono Spring Water Ice Co., 206 Pa., 481 (1903); Dougherty *v.* Hunter, 54 Pa., 380 (1867).

(57) Brooke *v.* N. Y., L. E. & W. R. R. Co., 108 Pa. 529 (1885).

(57*) American Car & Foundry Co. *v.* Alexandria Water Co., 218 Pa., 542 (1907).

done on behalf of corporations, and it can never be presumed that a corporate agent is acting wrongfully, or that an act which might have been a proper act to do on behalf of the corporation was done under circumstances rendering it improper.[58]

An agent of Adams' Express Company told a woman to whom valuable trunks had been shipped in Philadelphia that the trunks might remain in the custody of the company for a year. She left them, and at the expiration of three months they were sold under Act of December 14, 1863, P. L., 1127. Held, that the company was responsible for the agreement of the agent, though in making the same he transcended his real, but not his apparent powers.[59]

Where agents exceed their powers, corporations employing them may not avail themselves of the benefits of their acts and at the same time disavow their agent's authority.[60]

Where the evidence shows that a person assuming to be the agent of a corporation was a director and large stockholder of the company, a member of its executive committee, its secretary and treasurer, and the person named in a building contract as the representative of the company, to whom reports were to be made by the building inspector, with authority to approve or disapprove such reports, the corporation will be bound by an agreement made by such person relating to the building operation.[61]

169. Liability of Corporation for Representations of.

A corporation engaged in the manufacture and sale of goods is charged with the same responsibility to purchasers as are natural persons under similar circumstances. It is, therefore, answerable for the fraudulent representations of its agent made within the ostensible scope of his authority while transacting the business of the corporation.[62]

170. Admissions of.

In cases of alleged tortious conduct, such as negligence, unless

(58) Little Saw Mill Valley Tpk. Co. *v.* Federal St. & Pleasant Valley Pass. Ry. Co., 194 Pa., 144 (1899).

(59) Adams' Express Co. *v.* Schlessinger, 75 Pa., 246 (1874).

(60) Penn Nat. Gas Co. *v.* Cook, 123 Pa., 170 (1888).

(61) Culver to use *v.* Pocono Spring Water Ice Co., 206 Pa., 481 (1903).

(62) Erie City Iron Wks. *v.* Barber & Co., 106 Pa., 125 (1884).

the act is specially authorized, the admissions of an agent must be part of the *res gestae;* otherwise they are mere hearsay.[63]

171. When Agent May Not Claim Set-Off.

An agent of a corporation who has received money for its use cannot, in an action for money had and received, brought against him by the corporation, prove by way of set-off that he has paid debts of the corporation, without showing a special authority for that purpose. It is not enough to prove that the defendant acted for the treasurer, without showing some resolution of the board of directors, giving the treasurer the right to delegate his power to the defendant.[64]

172. Parol Assent to a Lease.

Where a lease required the written assent of a corporation, the parol assent of its agent would not make it liable in covenant, though it might in assumpsit.[65]

173. Miscellaneous.

In an application for the removal of a case in which a corporation is the moving party, the affidavit may be made by an agent or employe.[66]

Where an agent of a corporation purchases land and transfers it to the corporation at an advanced price, this is a fraud on the company which it alone can redress.[67]

In an action against a corporation on a contract alleged to have been made by an agent, where the course of dealing between the corporation and the agent tended to establish the fact of agency, it is not improper to admit in evidence declarations of the officers of the company, made subsequent to the date of the contract, to the effect that the person with whom the plaintiff dealt was the agent of the company.[68]

(63) Lombard & South St. Pass. Ry. Co. *v.* Christian, 124 Pa., 114 (1889) and cases cited.
(64) Tpk. Road Co. *v.* Watson, 1 Rawle, 330 (1829).
(65) Lehigh Coal & Nav. Co. *v.* Harlan, 27 Pa., 430 (1856).
(66) Vankirk *v.* Penna. R. R. Co., 76 Pa., 66 (1874).
(67) McAleer *v.* McMurray, 58 Pa., 126 (1868).
(68) Stewart *v.* Climax Road Machine Co., 200 Pa., 611 (1901).

CHAPTER XI.

DIRECTORS OF CORPORATIONS.

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174. Directors and Their Duties.

The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer

and such other officers, agents and factors as the corporation authorizes for that purpose, and nothing in any law contained shall prevent or be construed to prohibit the vice-president, treasurer, solicitor, or other officer of any corporation organized or existing under this act, from being a director of such company, and receiving at the same time such compensation for his services as such officer, as the board of directors of such company may direct. The directors or trustees shall be chosen annually by the stockholders or members, at the time fixed by the by-laws, and shall hold their office until others are chosen and qualified in their stead; the manner of such choice and of the choice or appointment of all other agents and officers of the company shall be prescribed by the by-laws. The number of directors or trustees shall not be less than three; one of them shall be chosen president by the directors, or by the members of the corporation, as the by-laws shall direct. The members of said corporation may, at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs, and a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum. . . . .[1]

175. Number of Directors—Act May 31, 1887.

It shall be lawful from and after the passage of this act, for any corporation, chartered or existing by or under any law of this State, to determine, by the vote of its stockholders holding a majority in interest of all its stock, at a meeting duly called for the purpose, the time of holding the annual meeting for the election of officers of the corporation, and the number of directors that shall thereafter govern its affairs: *Provided,* That the number of directors so determined shall not be less than three nor more than fifteen, and that at least one-third of the directors of every corporation shall be and remain, during their term of service, residents of the State of Pennsylvania: *And provided further,* That this act shall not apply to any company heretofore incorporated, unless such company shall file, in the office of the Secretary of the Commonwealth, a certificate of the acceptance of this act, and also of the provisions of the Constitution of this Commonwealth, which acceptance shall be made by resolution, adopted at a regular or called meeting of the directors, trustees or other

(1) Act May 14, 1891, P. L., 61, amending Sec. 5, Act Apr. 29, 1874.

proper officer of such corporation, certified under the seal of the corporation, and a copy of which resolution, certified under the seal of the office of the Secretary of the Commonwealth, shall be evidence for all purposes.[2]

176. Number of Directors—Act April 19, 1901.

In all corporations heretofore or hereafter incorporated under the laws of this Commonwealth, and in all foreign corporations heretofore or hereafter domesticated under the laws of this Commonwealth, the board of directors may consist of any number of persons not less than three. The number of directors may be increased or diminished, from time to time, by the stockholders of any such corporations, at any regular annual meeting or at any special meeting called for that purpose, of which notice shall be given as required by the by-laws; and it shall be lawful for any such corporation, by its by-laws, to authorize the board of directors to increase or decrease the number of the directors from time to time without a vote of the stockholders.[3]

177. Classification of Directors of Corporations of the First Class.

It shall be lawful to insert in any charter or amendment of a charter for a corporation of the first class, under the corporation act of one thousand eight hundred and seventy-four, and its supplements, a provision or provisions that the directors, managers, trustees, vestrymen or other governing body, as the case may be, of such corporation, may be elected so that a half, or a third or fourth of the whole number, only, shall be elected each year, the distribution to be made in such manner as the charter may direct.[4]

In all cases in which heretofore such provisions have been introduced into any charter for a corporation of the first class, or in any amendment of a charter of any such corporation, either antedating the said Act of one thousand eight hundred and sev-

(2) Act of May 31, 1887, Sec. 1, P. L., 281. This act is not restricted in its operations to corporations chartered prior to the constitution of 1873. Commercial Ice Co., 9 Pa. C. C., 608.

(3) Act April 19, 1901, P. L., 80. This act, although it does not repeal the preceding Act of May 31st, 1887, apparently supersedes it so far as changing the number of directors is concerned.

(4) Sec. 1, Act May 23, 1887, P. L., 165. In application of Salem's Lutheran Church, 15 W. N. C., 567 (1885), it was held that all directors of corporations of the first class must be elected annually.

enty-four or otherwise, and has been approved by the proper court and duly recorded, said provision of said charter or amendment is hereby ratified and confirmed.[5]

178. Classification of Directors of Corporations of the Second Class.

Whenever the stockholders of any corporation incorporated under the Act of April twenty-ninth, one thousand eight hundred and seventy-four, or any other law of this Commonwealth, shall, at a meeting called for the purpose, decide, by a majority vote of those present either in person or by proxy, to elect a portion of their directors for a term or terms longer than one year, it may and shall be lawful for such corporation, at the next ensuing election, to divide the directors or managers which are to be chosen, into two, three or four classes, and to elect the first class to serve for the term of one year, and the second, third or fourth to serve for two, three or four years, respectively, and at all ensuing elections of said corporations, the stockholders shall only elect the number of directors necessary to take the place of those whose term of office shall then expire, and such directors shall be elected for the longest term for which any class may have been elected as hereinbefore provided.[6]

Such classification where already made by charter is hereby declared valid.[7]

179. Classification of Directors of Transportation Companies.

It shall be lawful for the stockholders of any railroad, railway or other transportation company at any meeting, annual or otherwise, held after notice of intention to present thereto the subject of such classification, by a vote of a majority of the shares there represented, either in person or by proxy, to classify its directors or managers thereafter to be chosen into two, three or four classes, each to contain an equal number unless the board shall consist of a number which shall not be divisible into equal parts, in which case the excess which cannot thus be divided shall be added to the first class. At the next annual election of said corporation, held after such classification shall have been determined upon, directors or managers of the first class shall be elected to serve for

(5) Sec. 2, Act May 23, 1887, P. L., 165.
(6) Act June 17, 1887, Sec. 1, P. L., 411.
(7) Act June 17, 1887, Sec. 2, P. L., 412.

the term of one year, and directors or managers of the second, third or fourth classes shall be elected to serve for two, three or four years, respectively. At all ensuing elections of said corporation the stockholders shall only elect the number of directors or managers necessary to take the place of those whose term of office shall have then expired or be about to expire, and such directors or managers shall be elected for the longest term for which any class may be elected. Every vacancy which shall occur in any class of the members of the board shall be filled by the board until the next annual election for members of the class in which such vacancy shall occur. After any corporation shall have determined upon any such classification as that herein permitted, it shall not thereafter change the same, unless with the assent of the stockholders duly expressed at a meeting properly called. All laws or parts of laws inconsistent herewith are hereby repealed.[8]

180. Classification of Directors of Insurance Companies.

Whenever the stockholders or members of any insurance company incorporated under the provisions of the act, entitled "A supplement to an act entitled 'An Act to establish an Insurance Department,' approved the fourth day of April, one thousand eight hundred and seventy-three, providing for the incorporation and regulation of insurance companies, and relating to insurance agents and brokers and to foreign insurance companies," approved the first day of May, one thousand eight hundred and seventy-six, or incorporated under the provisions of any special law of this Commonwealth, and having accepted the provisions of the above mentioned act approved the first day of May, one thousand eight hundred and seventy-six, shall, at a meeting called for the purpose, decide by a majority vote of those present either in person or by proxy, to elect a portion of their directors or managers for a term or terms longer than one year, it may and shall be lawful for such insurance company, at the next ensuing election, to divide the directors or managers which are to be chosen into two, three or four classes, and to elect the first class to serve for the term of one year, and the second, third and fourth, to serve two, three and four years respectively, and at all ensuing elections of said insurance companies the stockholders or members shall only elect the number of directors or managers necessary to take the

(8) Act Feby. 9, 1901, P. L., 6.

places of those whose terms of office shall then expire, and such directors or managers shall be elected for the longest term for which any class may have been elected as hereinbefore provided.[9]

In case a vacancy or vacancies shall happen in the number of said directors or managers, the board of directors or managers shall choose and elect a proper person, or proper persons, to fill such vacancy or vacancies during the remainder of the term or terms for which the person or persons whose death, resignation or withdrawal shall have been elected.[10]

In all cases in which any insurance company, as aforesaid, shall have, by a majority vote of the stockholders or members present at a meeting heretofore held, as aforesaid, directed such division and classification of its directors or managers, such classification, so directed, and elections held thereunder, shall have like force and effect as if the same had been made after the passage of this act.[11]

181. Who may be Directors.

Non-resident or alien friend stockholders may be directors of domestic corporations, where there is no express requirement to the contrary.[12] And directors need not, under the Act of April 29, 1874, be stockholders in the companies of which they are directors.[13] Hence, when there is no by-law to the contrary, a director owning stock is not disqualified by the sale of the same.[13*] But where the by-laws of a corporation provide that a stockholder can only be eligible to the position of director if at least three months' dues have been paid on his stock, a person who subscribes for stock a few hours before the election, paying nothing thereon, but telling the secretary of the company to pay the three months' dues for him, which the secretary does shortly after the election, is not eligible to the position of director, and will be

(9) Sec. 1, Act Apr. 4, 1901, P. L., 64. This and the preceding act are apparently wholly unnecessary, as the Act of June 17, 1887, P. L., 412 supra, applies by its terms to all corporations formed under any law of this Commonwealth.

(10) Sec. 2, Act April 4, 1901, P. L., 64.

(11) Sec. 3, Act April 4, 1901, P. L., 65.

(12) Com. *v.* Detwiler, 131 Pa., 614 (1890).

(13) Op. Atty. Gen., 7 Pa. C. C., 178 (1880); Coe *v.* Leckrone Coke Co., 30 Pa. C. C., 113 (1904).

(13*) Beyer *v.* Locher, 22 Lanc. L. R., 177 (1905).

ousted therefrom by proceedings in quo warranto.[13**] Directors of banks of deposit and of co-operative associations must be stockholders therein. See Secs. 945, 1196.

182. One May be Director in Two or More Corporations Doing Business With Each Other.

While the same person may legally and properly act as a director in two corporations, even when such corporations are dealing with each other, the actions of such person should be open and free from any suspicion of secret dealing in favor of one principal, while acting as the agent of the other.[14]

183. Directors Named in Articles of Association Do Not Necessarily Serve for a Year.

Notwithstanding that the articles of association set forth the names of the persons who are to serve as directors for the first year, other directors may be elected during such first year of the corporate existence, and those so elected immediately succeed the persons named in said articles.[15]

184. Quorum.

. . . . A majority of the whole number of such directors or trustees shall be necessary to constitute a quorum. . . . [16]

Whenever the number of directors or managers of any corporation may be increased under authority of law, a majority of the whole number shall be necessary to constitute a quorum; and all laws inconsistent with this act be and the same are hereby repealed.[17]

The by-laws may provide that a larger number of directors than a majority shall be necessary to constitute a quorum.

By-laws providing that less than a majority of the directors shall form a quorum, are void, as in contravention with the Act of 1874 and its supplement of May 14, 1891, P. L., 61.[18] When a

(13**) Com. *v.* Stevenson, 200 Pa., 509 (1901).

(14) Mercantile Library Co. *v.* Pgh. Library Assn., 173 Pa., 30 (1896).

(15) Com. *v.* Helms et al., 26 W. N. C., 358 (1890); 8 Pa. C. C., 410.

(16) Act May 14, 1891, P. L., 61, amending Sections 5, Act April 29, 1874, P. L., 73.

(17) Act April 15, 1869, P. L., 29.

(18) Curry *v.* Claysville Cemetery Co., 5 Pa. Super. Ct., 289 (1897).

lawful quorum is present it seems that it is not necessary for all present to vote.[19]

Where a certain number of directors are required to constitute a quorum for making contracts, a contract to which the corporate seal was affixed by a less number than are competent to make the contract is valid, provided the seal be affixed by direction of the legal quorum.[20] When action is taken by a meeting of the board of directors at which a quorum is not present, there must, to validate such action be a subsequent ratification by the board, and acts done or permitted to be done by individual directors or stockholders will not be construed to amount to a ratification when such acts have never been brought to the attention of either the stockholders or the directors.[20*]

A director may, in the absence of fraud or deception or anything indicating that creditors are prejudiced or the amounts claimed by him are not justly due and payable, assist in making a quorum of the board and in voting payments to himself.[20**]

185. Vacancies in the Board of Directors.

In case of death, removal or resignation of the president or any of the directors, treasurer or other officer of any such company, the remaining directors may supply the vacancy thus created until the next election.[21]

Under the foregoing enactment the directors may make appointments which will hold good until the next actual election, though the regular date for the holding of elections may intervene, no election then being actually held.[22]

Directors under the right to fill vacancies cannot create a vacancy by ousting a director because of alleged or undetermined ineligibility. Such questions must be determined by the courts.[23]

Where a vacancy occurs in the board and the remaining directors, who own all the stock fill the vacancy, it is immaterial

(19) Mercantile Library Hall Assn. *v.* Pgh. Library Assn., 42 Pitts. L. J., 345 (1895); Com. *v.* Wickersham, 66 Pa., 134 (1870).

(20) Berks and Dauphin Tpk. Road Co. *v.* Myers, 6 S. & R., 12 (1820).

(20*) Greensboro Gas Co. *v.* Home Oil & Gas Co., 33 Pa. C. C. Rep., 658 (1907).

(20**) Haerther *v.* Southern Power & Milling Co., 16 D. R., 253 (1907).

(21) Sec. 9, Act April 29, 1874, P. L., 78.

(22) Pa. Milk Producers' Assn. *v.* Nat. Bank of Honeybrook, 20 Pa. C. C., 540 (1898).

(23) Com. *v.* Detwiler, 131 Pa., 614 (1890).

that they designate the meeting at which they take such action a stockholders' meeting, where the appointment has been acquiesced in by the board.[23*]

As already noted, vacancies in the board of directors or officers of corporations may be filled by the remaining directors until the next annual election.

It not infrequently happens, through a change in the controlling interests of a corporation, that it is desired to change all the members of the board of directors at once and elect others to fill their places.

It is evident that if all the retiring directors were to resign at once there would be no authority capable of accepting their resignations or of electing their successors until a meeting of the stockholders was held.

The proper method of procedure in such cases is, to convene a meeting of the board of directors at which a number of the proposed new directors at least equal to a quorum of the board shall be present, and at which the retiring directors present their resignations one by one, each vacancy being filled by the election of a successor before another resignation is accepted, which successor thereupon takes part in the proceedings. In this manner a quorum of the board is always in existence.

When the resignation of a director who is also an officer is accepted, it is customary, after the election of his successor as a director, to hold an election to fill the office which he held, and for the person so elected to at once assume the duties of his office. A form of minutes for a proceeding of this nature will be found in the Appendix.

186. Directors May Act Only at Meetings of the Board.

In all matters involving a judicial or legislative discretion and which cannot therefore be delegated, the board of directors can only act together as a board, and independent action by members outside of a properly constituted meeting is not sufficient to bind the corporation, unless followed by proof that the same was within the scope of their authority or of some special agency.[24]

(23*) Coe *v.* Leckrone Coke Co., 30 Pa. C. C., 113 (1904).

(24) Fisher *v.* Harrisburg Gas Co., 1 Pears., 118 (1857); Stoystown & Greensburg Tpk. Rd. Co. *v.* Craver, 45 Pa., 386 (1863); Langolf *v.* Sieberlich, 2 Pars., 64 (1881); Curry *v.* Claysville Cemetery Co., 40 W. N. C., 536 (1897); Rittenhouse Estate, 140 Pa., 172 (1891).

Individual directors have no power to bind their corporations by an express promise, unless authorized so to do.[25]

A contract between a corporation and the owner of a store building to lease such building to the corporation is valid where, although there was no formal acceptance of the lease by the board of directors, it appears that the offer was made to a director and general manager of the company, by whom it was communicated to several other directors, that subsequently in pursuance of the offer the board summoned a stockholders' meeting to increase the capital stock in order to issue the preferred stock contemplated by the contract to lease, that such increase was subsequently authorized by the stockholders and that the person making the offer was elected a director of the company, appointed on a committee to carry out the arrangements contemplated by the lease, and made statements in writing which indicated that he understood that the corporation had accepted his offer.[24*]

187. Notice of Directors' Meetings.

In the absence of a by-law or custom to the contrary at least one full day's notice should be given of a directors' meeting. Notice of a special meeting was dated and mailed to the directors on January 2, calling for a meeting at four P. M., on January 3. There was no evidence that the notices were received before the morning of January 3. There was no by-law or custom as to the time within which notice should be given. Held, that the notice was insufficient in time.[26]

A notice of a special meeting of directors stated that the object of the meeting was "to hear the treasurer's report and to transact any other business which may come before them." The meeting was called for the last business day during which the board would be in existence. Held, that the notice of the special meeting was not sufficient to sustain the action of the directors in authorizing a lease which practically divested the company of all its property and active functions.[27]

A resolution authorizing the assignment of certain insurance

(24*) Person & Riegel Co. *v.* Lipps, 219 Pa., 99 (1907).

(25) Workhouse *v.* Moore, 95 Pa., 408 (1880).

(26) Mercantile Library Hall Assn. *v.* Pgh. Library Assn., 173 Pa., 30 (1896); Fisher *v.* Harrisburg Gas Co., 1 Pears., 118 (1859).

(27) Mercantile Library Hall Assn. *v.* Pgh. Library Assn., 173 Pa., 30 (1896).

policies, passed at a meeting of the directors, of which meeting all the directors did not have timely notice, is voidable; but if no officer or stockholder makes any objection to it, their acquiescence must be held to be a ratification, and no creditor can question its validity.[28]

A majority of the directors of a corporation at a special meeting, held without notice to those of the directors who were not present, authorized the mortgaging of the corporation's property. In a feigned issue to try the validity of the mortgage, held, that the mortgage did not originally bind the company, though subsequent acts amounted to a ratification.[29]

Certain directors of a corporation met specially and executed a lease of its franchises and property to another corporation. The president of the lessor company, who was also a director, was not present at or notified of such meeting. On a bill to have the lease rescinded and declared void, held, that it was invalid.[30]

Where a person relying upon the minutes of a corporation enters into a contract with the company, and renders services and makes expenditures under the contract, the company cannot relieve itself from liability because the meeting of the directors at which the resolution was passed had not been legally called, if it appears that the party making the contract had no knowledge of the illegality of the meeting.[30*]

188. Minutes of Directors' Meetings.

In an action against a corporation by its president to recover salary, a resolution of the board of directors to pay the salary claimed and entered on the minutes was put in evidence as proof of plaintiff's claim. On the part of the defendant there was the testimony of certain directors that they understood that the money was not to be paid to the president. Held, that the minutes were conclusive against and binding upon the corporation.[31]

But where a resolution to reimburse the treasurer of a corporation, by a board of directors, in a certain amount was adopted, and it did not appear by the minutes of the annual meet-

(28) Moller et al. *v.* Keystone Fibre Co., 187 Pa., 553 (1898).

(29) Gordon *v.* Preston, 1 Watts, 385 (1833).

(30) Kersey Oil & Mineral Co. *v.* Oil Creek & A. R. R., 5 W. N. C., 144 (1877).

(30*) Wyss-Thalman *v.* Beaver Brewing Co., 219 Pa.

(31) McGowan *v.* Lincoln Park & S. Co., 181 Pa., 55 (1897).

ing that the report containing the treasurer's accounts, with the credit allowed, had been adopted, evidence was admitted to show that the report had, in effect, been adopted.[32]

189. Common Law Liability of Directors.

"Directors are not technical trustees. They can only be regarded as mandatories—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence and no more. . . . . While directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or wilful misconduct or breach of trust for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." [33]

Even if they violate the charter, they are not liable, if it was a question upon which, with all due care, they might have made an honest mistake.[34]

A director of a corporation is a trustee for the entire body of stockholders, and undertakes, on assuming office, to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammeled by any hostile interest in himself or others, and all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made was also of advantage to the corporation.[35]

A bill may be brought against directors personally when they have been guilty of such obvious and gross mismanagement of the affairs of a company as to amount to a fraud upon their rights and interests, and not only may the shareholder thus call the di-

(32) Harmony Bldg. Assn. *v.* Goldbeck, 13 W. N. C., 24 (1883).

(33) Spering's Appeal, 71 Pa., 11 (1872); Chambers *v.* McKee, 42 W. N. C., 90 (1898); 185 Pa., 105; Com. *v.* Anchor B. & L. Assn., 20 Pa. Super. Ct., 101 (1902).

(34) Spering's Appeal, 71 Pa. 11 (1872).

(35) Bird Coal and Iron Co. *v.* Hume, 157 Pa., 278 (1893).

rectors to a formal account where he has been fraudulently deprived of money justly belonging to him, but he may also, under proper circumstances, interfere for the protection of the company itself.[36]

Where an act of the directors is in excess of their authority, but is done with the *bona fide* intention of benefitting the corporation, and a shareholder, knowing of it, does not dissent within a reasonable time, his assent will be presumed and he cannot gainsay it. Where directors act honestly for what they esteem the best interests of their company, and do not wilfully pervert their powers, but only misjudge them, they will not be held to account for money expended in such case.[37]

Bank directors, being gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud. If they use the ordinary care which bank directors usually exercise, they will not be liable for misappropriations by the officers of the bank.[38]

The directors of a corporation, under authority of the stockholders, sold all the corporate property to a hotel company, taking stock in the latter in payment, which stock proved worthless. It appeared that the said stock never had any real value, though it did have, for a while, some speculative value. The directors, with the approval of the stockholders, retained the hotel stock in the expectation that it would, at some time, have a value, owing to the fact that their own company could not distribute the stock in kind to their own shareholders because it was in debt. Held, that the directors were not liable.[39]

STATEMENTS TO BE FILED BY OFFICERS OF MANUFACTURING, MECHANICAL, ETC., COMPANIES.

190. Statutory Liability of Directors and Officers.

Every such corporation shall, annually, in September, make, and the president, treasurer and a majority of the directors, shall

(36) Gravenstine's Appeal, 49 Pa., 310 (1865); Watt's Appeal, 78 Pa., 370 (1875).

(37) Watt's Appeal, 78 Pa., 370 (1875).

(38) Swentzel *v.* Penn Bank, 147 Pa., 140 (1892). Citing Spering's Ap., 71 Pa., 11; Maisch *v.* Savings Fund, 5 Phila., 30; Briggs, Receiver, *v.* Spaulding, 141 U. S., 132.

(39) In re Lincoln Market Co., Clayton's Appeal, 190 Pa., 124 (1899).

sign, swear to and deposit with the recorder of deeds for said county, a certificate stating the amount of capital stock paid in, the names and number of shares held by each stockholder, the amount invested in real estate and in personal estate, the amount of property owned and debts due to the corporation, on the first day of August next preceding the date of such certificates, and the amount, as nearly as can be ascertained, of existing demands against the corporation at the date of the certificate.[40]

When the officers of such corporation have failed to perform the duties prescribed in this act, as to making certificates, the certificates therein mentioned may be made and filed at any time after such failure; and such officers shall not be personally liable for debts of the corporation contracted after the requisitions of this act have been complied with.[41]

Officers and directors of corporations formed under the Act of April 29, 1874, are not individually liable for the debts of the company, on account of a failure to file a statement under Sec. 39, Cl. 8, of said act. The said clause was taken from Sec. 33 of the Act of July 18, 1863, but the 34th section of said Act of 1863, which imposed the penalty for a failure to file the certificate provided for by Sec. 33 was not re-enacted in the Act of 1874.[42]

The said penalty provided for by the Act of 1863 was not, however, abrogated, either expressly or impliedly, in its application to corporations formed under the Act of 1863, by the Act of April 29, 1874.[43] But the officers of such companies are liable only for debts contracted during their terms of office, respectively.[44]

Directors of mechanical, mining, quarrying and manufacturing corporations formed under the provisions of Cl. 18, Sec. 2, of the Act of April 29, 1874, are by Cl. 6 of Sec. 39 of said act[44*] made jointly and severally liable for any excess of indebtedness over the amount of capital stock actually paid in, to the amount of such

(40) Sec. 39, Clause 8, Act April 29, 1874, P. L., 102.

(41) Sec. 39, Clause 9, Act April 29, 1874, P. L., 103.

(42) Barber et al. *v.* Standard Sewer Pipe Co., 5 Pa. C. C., 293 (1888); Green et al. *v.* Whitehead et al., (No. 2), 5 D. R., 613 (1896); Magargee & Green Co. *v.* Ziegler, 9 Pa. Super. Ct., 438 (1899). See Lexow *v.* Pa. Diamond Drill Co., 5 D. R., 491 (1896).

(43) Kurtz *v.* Wigton, 34 W. N. C., 219 (1894); Potter *v.* McLean, 1 W. N. C., 513 (1875).

(44) Hoopes *v.* Stidham et al., 13 W. N. C., 266 (1883).

(44*) See sec. 1356.

excess incurred during their administration, until the debts are reduced to the amount of the capital stock; and a court of equity is a tribunal peculiarly fitted for the adjudication and enforcement of claims of this character.[45]

The liability of directors under said provisions cannot be evaded by applying the corporate assets to such indebtedness to the prejudice of the corporation or of third parties. This is not such a reduction as will relieve the directors from personal liability.[46]

The indebtedness contemplated by the Act of 1874 is not merely the extraordinary or bonded indebtedness of the corporation, but its ordinary debts as well. The obligation of the directors for such indebtedness is governed wholly by the Act of 1874, and not by the Act of April 1, 1849, P. L., 563, which is repealed thereby,[47]

A liability arising from the infringement of letters patent is not such indebtedness as is contemplated by the Act of July 18, 1863, making the directors personally liable in cases of indebtedness over the amount of the capital stock of their corporation.[48]

The limitation of liability of stockholders for labor done, etc., imposed by the 15th section of the Act of April 29, 1874, P. L.,

(45) Magargee & Green Co., *v.* Ziegler, 9 Pa. Super. Ct., 438 (1899). In Wagner et al. *v.* Corcoran et al., 2 D. R., 440 (1893) it was held that Secs. 41 and 42 of the Act of July 18, 1863, providing for the method of proceeding against officers who have permitted the indebtedness of corporations to exceed their capital stock, are still in force, and that persons proceeding against such officers of companies formed under the Act of 1874, agreeably to Section 39 of said Act of 1874, must comply with the provisions of said 41st and 42d Sections of said Act of 1863.

The provisions of the general corporation Act of April 29, 1874, Sec. 39, cl. 6, P. L., 73, making directors liable for corporate debts in excess of the capital stock actually paid in, is enforceable only in the manner provided by Secs. 41 and 42 of the Act of July 18, 1863, P. L., 1102 (1864), which requires a creditor before proceeding against the directors to first obtain a judgment against the corporation and issue execution thereon. These sections of the Act of July 18, 1863, are not supplied by anything contained in the Act of April 29, 1874, and are not repealed by that act. The fact that a corporation has been adjudicated a bankrupt does not dispense with the necessity of the preliminary proceeding against it, as provided by the Act of 1863. Frank P. Miller Paper Co. *v.* York Coated Paper Co., 34 Pa. Super. Ct., 315 (1907).

(46) Magargee & Green Co. *v.* Ziegler, 9 Pa. Super. Ct., 438 (1899); Roth *v.* Playford, 25 Pa. C. C., 345 (1901).

(47) Green et al. *v.* Whitehead et al., (No. 2), 5 D. R., 613 (1896).

(48) Roberts *v.* Reed, 4 W. N. C., 417 (1877).

81, to six months, applies to the indebtedness mentioned in Sec. 14 of said act, and not to the liability of officers and directors of mining, mechanical, etc., companies, imposed by Sec. 29 of said Act of 1874.[49]

Sec. 8 of the Co-operative Association Act of April 14, 1868, P. L., 101, provides that if the board of directors fail to make the annual statement required by said act, or if they make a false statement, they shall be liable for all debts of the corporation. Under this provision the directors are jointly liable, and where one of them dies before suit brought, his executor cannot be sued jointly with the survivors, and if he die after suit brought against all of them, it is optional with the plaintiffs to bring in his administrator, or proceed against the survivors without doing so.[50]

Where an act authorizes suits to be brought against officers of corporations individually, upon their failure to perform certain acts, it is error to join the corporation as a party defendant.[51]

Where an Act of Assembly directed the president, managers and company of a turnpike road to remove a toll gate, the president and managers are not individually liable to indictment if the mandate of the act is not obeyed.[52]

The directors of a manufacturing company maintaining a company store cannot be held personally liable for goods sold to the company for sale at such store, because in voting to establish such store they violated the provisions of Sec. 43 of the Act of April 29, 1874.[53]

Where a personal liability is imposed upon directors for declaring illegal dividends, the directors cannot be proceeded against until there has been a failure to collect from the corporation, by execution.[54]

Creditors of a corporation, elected directors thereof, holding no stock, are not personally liable for goods furnished and used in the business of the company.[55]

(49) Green et al. *v.* Whitehead et al. (No. 1), 5 D. R., 612 (1896).

(50) Githers *v.* Clarke, 158 Pa., 616 (1893).

(51) Sheriff *v.* Oil Co., 1 Brewst., 489 (1867); Smucker *v.* Duncan, 10 Pa. C. C., 430 (1891).

(52) Com. *v.* Detmuth, 12 S. & R., 389 (1825).

(53) Smucker *v.* Duncan, 10 Pa. C. C., 430 (1891).

(54) Archer *v.* Rose, 3 Brewster, 264 (1869).

(55) Beeson *v.* Lang, 85 Pa., 197 (1877).

191. Directors of Manufacturing, Mechanical, etc., Companies Individually Liable for Declaring Dividends When.

If the directors of any company declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office: *Provided,* That the amount for which they shall be liable shall not exceed the amount of such dividend, and if any of the directors are absent at the time of making the dividend or object thereto, at said time, and file their objections in writing with the clerk of the company, they shall be exempted from such liability.[56]

Where a recovery is had against a director for making an illegal dividend, he is not entitled to subrogation as against the company.[57]

192. Directors Must Account for Secret Profits.

In their capacity as trustees for the stockholders, the directors may not profit by their own official acts.

Directors who voted for a resolution purporting to authorize the payment of a commission of one-third of the stock of their company for selling the other two-thirds, and receiving a part of the stock in pursuance thereof, were held liable to the company and its assignee for the benefit of creditors for the full value of all the stock issued under the resolution, less the amount actually paid therefor.[58]

A person claiming to own the charter of an unorganized corporation by purchase from the commissioners, may not sell it to the board of directors of a corporation of which he is a director and retain the price.[59]

A director who is also a creditor of an insolvent corporation, may not benefit by an assignment which was accomplished by his vote, but such assignment, though void as to him, is lawful as to the preferences created and conferred by it.[60]

Directors may not, on grounds of public policy, be permitted

(56) Sec. 39, Clause 5, Act April 29, 1874, P. L., 102. See Sec. 475a.

(57) Hill *v.* Frazier, 22 Pa., 320 (1853); Kisterbock's Appeal, 51 Pa., 483 (1866).

(58) Freeman *v.* Stine, 38 Leg. Int., 268 (1881); 15 Phila., 37.

(59) Freeman *v.* Stine, 38 Leg. Int., 268 (1881); 15 Phila., 37.

(60) Moller et al. *v.* Keystone Fibre Co., 187 Pa., 553 (1898).

to recover on promissory notes given them to induce them to withdraw opposition to contemplated action by the board of directors in the matter of a purchase of property.[61]

A stockholder in a coal mining corporation, in consideration of his discontinuing a suit to enjoin the carrying into effect of a lease of the coal lands of the company, received from the lessee three cents per ton on all coal mined under the lease. He afterwards became a director, and partly on his recommendation the royalty paid by the lessee was reduced three cents per ton. Held, that he was bound to account for the profits received after the reduction of the royalty.[62]

A director cannot acquire title to corporate property purchased by him at a judicial sale, as against the corporation, but he is entitled to receive from the company the amount paid by him in the purchase and maintenance of the same, where there is no actual fraud in the transaction.[63]

Where the directors, who were also promoters, purchased property before the company was formed, and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company.[64]

An answer to a bill in equity against the president of a corporation to account for secret profits alleged to have been made in the sale of real estate belonging to the corporation, is responsive which denies the negotiations alleged to have been made with the purchaser and the receipt of any secret profits and alleges that certain securities referred to in the bill were acquired by defendant from said purchaser through transactions not connected with the complainant or its property.[64*]

A co-operative banking company, organized under the Act of

(61) Kauffman *v.* Keiper et al., 5 D. R., 620; 18 Pa. C. C., 181 (1896).

(62) Bird Coal & Iron Co. *v.* Hume, 157 Pa., 278 (1893).

(63) Sebring *v.* Joanna Heights Assn., 2 D. R., 629 (1893). But the rule seems to be otherwise now in other States. See McKittrick *v.* Arkansas Central Ry., 152 U. S., 473, 497 (1894) and cases cited; pp. 1290-1, Cook on Corpns., Sec. 653, and see Ashhurst's Appeal, 60 Pa., 290 (1869) where the directors bought the property of their company on the verge of a sheriff's sale.

(64) Simons *v.* Vulcan etc., Co. 61 Pa., 202 (1869).

(64*) Rushbrook Coal Co. *v.* Jenkins, 214 Pa., 516 (1906).

April 14, 1868, P. L., 100, was notified by the banking department that it was conducting a business not authorized by the charter. Thereupon the directors, without authority from the stockholders, conveyed all the assets to a new company, which assumed all the liabilities of the old one, provided that the old company should make "good any and all losses or discrepancies that may occur between the assets and liabilities." The new company administered the assets, paid the liabilities and claimed a balance of several thousand dollars, whereupon the directors of the old company levied an assessment on the stock of said company, which had not been fully paid. Held, that there was no power in the directors to make such disposition of the property of the company or to levy such assessment for the purpose named.[64**]

193. Disposition of Property and Franchises of a Corporation by Directors.

The directors of a corporation may sell its property for the purposes of the corporation, but not close up the affairs of the company or transfer its property for the benefit of a portion of its members.[65]

Directors have no right to dispose of the company's movable property where this prevents a continuance of its business. Such a sale by them is void as against dissenting stockholders, but if the stockholders, having notice, are silent, and make no objection, they will be taken to have assented.[66]

A majority of the directors of a passenger railway company, though controlling a majority of the stock, have no power to execute a lease of the road and property, without first submitting the question to the stockholders at a meeting called for that purpose.[67]

Where the lease of the property of a railroad company was made by the directors, whose action was never formally confirmed by the stockholders, and the road was operated by the lessee company for ten years, and the provisions of the lease complied with, a statement of these transactions having been published in the

(64**) Farmers' Corp. Trust Co. *v.* Hazen, 21 Pa. Super. Ct., 130 (1902).

(65) Temperance Mut. Ben. Assn. *v.* Home Friendly Society, 187 Pa., 38 (1898); 9 Pa. C. C., 617.

(66) Balliet *v.* Brown, 103 Pa., 546 (1883).

(67) Martin *v.* Continental Pass. Ry. Co., 14 Phila., 10 (1880). See Kersey Oil Co. *v.* Oil Creek & Allegheny R. R. Co., 5 W. N. C., 144 (1878).

annual reports of the lessor company for said years, the court left it to the jury whether or not there was not an implied approval of the lease.[68]

Directors may not do, without the consent of the stockholders, an act which practically winds up the business of their corporation.[69]

The directors of a corporation have no authority to transfer, assign or in any manner convey the franchises of the corporation without the express authority of the stockholders.[70]

194. Where Corporation is Insolvent Directors May Assign.

Where a corporation is insolvent the directors may make an assignment, in the absence of any provision to the contrary in the charter, without notice to or action by the stockholders.[71]

195. Contracts Between Directors and Their Corporations.

The general rule is, that contracts between directors and their corporations are not void but voidable, and that if there is no objection to such a contract upon the part of the stockholders, it is valid.[72] In Pennsylvania such contracts are carefully watched and their fairness must be shown, but when their fairness is made to appear they are valid.[73]

Any contract, however, between a board of directors and the president or a director of a building association which invites or enables that officer to profit at the expense and to the loss of the company, is disfavored by the law.[73*]

Certain directors of a corporation were the mortgagees of its

(68) Coxe *v.* Camden & A. R. R. Co., 17 Phila., 349; 11 W. N. C., 386 (1885).

(69) Mercantile Library Hall Assn. *v.* Pgh. Library Assn., 173 Pa., 30, (1896).

(70) Anderson *v.* Eltonhead et al., 26 W. N. C., 95.

(71) Boardman *v.* Keystone Standard Watch Co., 8 Lanc., 25; Dana *v.* Bank of U. S., 5 W. & S., 223 (1843); Lehigh Iron Co.'s Estate, 2 D. R., 543 (1892); 12 Pa. C. C., 257; Zucker *v.* Froment, 5 D. R., 579 (1896); Shaw *v.* Central B. & L. Assn., 45 Pitts. L. J., 195 (1897); Ardesco Oil Co. *v.* North Amer. Oil & Min. Co., 66 Pa., 375 (1870). See Anderson *v.* Eltonhead, 26 W. N. C., 95 (1890).

(72) Cook on Corpns., Sec. 649, p. 1267.

(73) Ashhurst's Ap., 60 Pa., 290 (1869); Barr *v.* Pgh. Plate Glass Co., (U. S. Cir. Ct. Ap.) 57 Fed. Rep., 86 (1893); Mueller et al. *v.* Union Fire Clay Co., 183 Pa., 450 (1898); Richardson *v.* Green, 133 U. S., 30 (1890).

(73*) Com. ex rel. *v.* Penn Germania B. & L. Assn., 9 D. R., 617 (1900).

property. The mortgage was defective in having been executed at a special meeting of which no notice was given. The corporation did not question the validity of the mortgage. As to the mortgagees: "That the mortgagees were members of the board cannot prejudice their title, for, treating with the corporation as individuals, and consequently as strangers, they were not bound to inquire into the regularity of the convocation, or to know that some of the corporators had not been summoned. Appearing at the meeting, to mingle in the business of it, not as agents of the corporation, but as parties treating adversely to its interests, they are presumed, as corporators, to know nothing which a stranger would not be bound to know." [74]

Where a director of a corporation having full authority to purchase for his company certain property, and having so purchased the same, sets up a recission of the contract that he may sustain a sale to himself for the purpose of reselling the same property to the corporation, the burden is on him to establish the transaction by a clear preponderance of testimony, and, further, to clearly show that he acted in good faith.[75]

An act of a corporation is not invalid because a director of the company voted for the same he being personally interested therein, where no fraud or undue advantage is apparent. A suit by one claiming to be secretary of a corporation seeking to avoid the action of the company on the ground that a director who was personally interested in the subject matter voted thereon at a meeting of the directors, but fails to allege that there was fraud or collusion, or that the plaintiff is also a stockholder, fails to set out a cause of action and will be dismissed.[75*]

196. Directors as Preferred Creditors.

Directors frequently advance money to their corporations, and numerous cases have arisen involving the right of such directors to secure a preference in the payment of their claims over those of the other creditors of such companies.

When the whole property of an insolvent corporation is transferred to its directors in partial payment of advancements made to

(74) Gordon *v.* Preston, 1 Watts., 385 (1833).

(75) Dent *v.* Huntley, 182 Pa., 607 (1897).

(75*) Haerther *v.* Southern Power & Milling Co., No. 2, 34 Pa. C. C., 132 (1907).

it by them in good faith, they hold the same in trust for the creditors of the corporation. On distribution they are entitled to participate pro rata with other creditors, if it appear that in the matter of attempting to prefer themselves they acted openly and in good faith. Where the property was appraised at the time of transfer to them, and they kept and used it for several years, they must account for the amount of the appraisement and not for the smaller sum for which the property ultimately sold[75**]

"The rule that an officer or director of an insolvent corporation cannot prefer his individual debt, is based, not on statutory insolvency, but on the unfair and fraudulent character of the transaction. He is the trustee of the corporate property for the benefit of all creditors and stockholders, and has superior knowledge of the financial condition of his company. It would be highly unjust to permit him to use his position for his individual interest to the prejudice of others. But, if the contract be made when the corporation is solvent, or believed by the officer to be solvent, the reason for the rule disappears, because the officer has no motive distinguishable from that of the other creditors to seek payment or security for his debt. That a corporation, apparently solvent, may, by subsequent disasters or mismanagement, cease to do business and be sold out by the sheriff for a sum far less than its debts, does not of itself prove that it was insolvent when the alleged illegal contract was made."[76]

The rule is that officers and directors of solvent or apparently solvent corporations may secure the payment of their claims against such companies, but in the case of insolvent or failing corporations the officers and directors may not secure advantages over the other creditors of such corporations.[77]

When directors advance money to pay obligations of their corporation at a time when it is solvent, with no understanding that

(75**) Hill *v.* Standard Telephone Mfg. Co., 209 Pa., 231 (1904).

(76) Finch Mfg. Co. *v.* Stirling Co., 187 Pa., 596 (1898).

(77) Cowan et al. *v.* Penna. Plate Glass Co., 184 Pa., 1 (1898); Mueller *v.* Monongahela Fire Clay Co., 183 Pa., 450 (1898); Law *v.* Fuller, 217 Pa., 439 (1907); Sicardi *v.* Keystone Oil Co., 149 Pa., 148 (1892); Hopkins' & Johnson's Appeal, 90 Pa., 69 (1879); Rice's Appeal, 79 Pa., 168 (1875); Chas. Beck Paper Co. Ltd. *v.* Bates Paper Box Co., et al., 7 D. R., 477 (1898). In Gordon *v.* Preston, 1 Watts. 385, cited in Mueller *v.* Fire Clay Co., supra, to be an exception to the rule, the company was insolvent when the mortgage was given. In Neal's Appeal, 129 Pa., 64 (1889) the judgment bond given to the directors to secure them on their endorsements for the company were sustained, it not appearing that the company was insolvent when it was made. Hoggsett *v.* Columbia Iron & S. Co., 203 Pa., 148 (1902) is plainly an exception to the rule.

they are to be protected in so doing, and subsequently, when the corporation becomes insolvent, they, knowing the company to be so, take a judgment note for the amount of such advancement, they secure no priority over general creditors.[77*]

A corporation had assets worth $40,000 and debts of $16,000 without sufficient money to meet maturing indebtedness. It owed $5,000 to banks, on notes endorsed by four directors. On the banks demanding further security, the corporation confessed judgment to the four directors in trust for the bank. Held, that the facts were not sufficient to sustain an allegation that the corporation was insolvent when judgment was confessed, and that such confession of judgment was, under the circumstances, permissible, though in such cases the stockholders have a right to the most exacting inquiry into the nature of the transaction.[78]

A director, who is also a creditor of an insolvent corporation, may not benefit by an assignment which was accomplished by his vote, but such assignment, though void as to him, is lawful as to the preferences lawfully created and conferred by it.[79]

Where directors have been compelled to pay from their own funds notes given by them for their corporation, they are creditors of the corporation and entitled to share in the distribution of its assets in the hands of a receiver.[79*]

A pledge of the goods of a corporation for advances actually made upon the faith of them is valid, though one of the directors who voted for the pledge is a member of the firm of pledgees; but where a bond in a penal sum is given by an insolvent corporation to a firm of which one of the directors is a member, conditioned that on default judgment may be entered "for any sum or sums that may be owing to" said firm, the whole case is one of presumptive fraud and illegality and calls upon the plaintiffs for an explanation.[80]

Where directors of a corporation are aware of its insolvency, and procure a transfer to themselves of all the property of the corporation in partial satisfaction of their debt, they hold such property in trust for the benefit of all the creditors.[81]

(77*) Pangborn *v.* American Vault S. & L. Co., 205 Pa., 83 (1903).
(78) Mueller et al. *v.* Monongahela Fire Clay Co., 183 Pa., 450 (1898).
(79) Moller et al. *v.* Keystone Fibre Co., 187 Pa., 553 (1898).
(79*) Forry *v.* Hanover Foundry & M. Co., 16 York, 73 (1902).
(80) Creighton *v.* Scranton Lace Curtain Mfg. Co., 191 Pa., 231 (1899).
(81) Hill v. Standard Telephone Mfg. Co., 198 Pa., 446 (1901).

A company executed judgment notes to several directors for money theretofore advanced. The court found that the company was insolvent at the time of the execution of the notes, and held that the said directors must share ratably with other creditors in the distribution of the assets of the company.[82]

But the directors of a manufacturing company, knowing it to be heavily in debt, but believing it to be solvent, may confess judgment to its treasurer for borrowed money absolutely necessary to pay wages and freight bills, without which the works of the company would have been closed.[83]

A coal company transferred to a manufacturing company certain machinery in part payment of a debt. The president of the coal company was also president of the manufacturing company. The coal company, at the time of the transaction, had expended large sums in improvements on a valuable lease, and large sums as advanced royalties. The company was new and the coal trade had been in such a state of depression that it had conducted a losing business. The company had given an option which had not expired, at a price which would have paid all debts, and saved a considerable value to the stock. Held, that the company was not insolvent in the sense that its insolvency would have invalidated the preference given to the manufacturing company in which the president of the coal company was interested.[84]

It seems that when the president of an insolvent corporation is present at a meeting of the directors which votes to give preference to another company of which the president is also an officer, and in which he is largely interested, the mere fact that the president does not vote on the resolution does not of itself rebut the presumption that the contract is void.[85]

If directors supply their corporation with money to meet its legitimate demands, and the money so furnished is properly used in carrying on the corporate business, they are entitled to recover the money advanced from the company, not upon the basis of any actual contract, but of a duty imposed by law that the corporation shall make fair compensation for what has been properly re-

(82) Chas. Beck Paper Co., Lim., *v.* Bates Paper Box Co., 21 Pa. C. C., 401 (1898).

(83) Cowan et al. *v.* Pa. Plate Glass Co., 184 Pa., 1 (1898).

(84) Finch Mfg. Co. *v.* Stirling Co., 187 Pa., 596 (1898).

(85) Finch Mfg. Co. *v.* Stirling Co., 187 Pa., 596 (1898).

ceived and applied to its uses; and this rule applies where the directors make advances to other corporations formed by the same persons for the purpose of carrying out different branches of a single, common enterprise; and this is especially so where the reimbursement is actually authorized at a stockholders' meeting of the company reimbursing.[85*]

The Act of June 4, 1901, P. L., 404, prohibiting the preferring of creditors now applies, of course, as well to directors as to other persons.[86]

197. Directors May Engage in the Same Kind of Business that Their Corporations are Engaged in.

Directors who are also officers of a manufacturing company, if acting in positive good faith to the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business, and do not stand in respect to said works in any trust relation to the corporation.[87]

The directors and one other stockholder of a manufacturing corporation owning among themselves a majority of the stock, conceived that the demands of trade required the erection of additional works, which they desired the corporation to build, but the project was defeated. The projectors then proceeded with their own funds to build independent works. Bad faith to the corporation was not imputable to any of them. When the works were nearing completion the corporation bought them, upon terms not unconscionable in themselves, and which had been approved by a large majority of a stock vote. The vendors, desiring to have the question decided by the minority stockholders, withheld their own votes until a large majority of the other stockholders had voted in favor of the purchase, and then cast their votes with the minority. The plaintiff, a minority stockholder, by his appeal, sought to reduce the vendor's profit. Held, that he was not entitled to relief.[88]

(85*) Kendall *v.* Klapperthal Co., 202 Pa., 596 (1902).

(86) See Sec. 415.

(87) Barr *v.* Pgh. Plate Glass Co., U. S. Cir. Ct. Ap., 57 Fed. Rep., 86 (1893). Confirming 51 Fed. Rep., 334.

(88) Barr *v.* Pgh. Plate Glass Co., U. S. Cir. Ct. Ap., 57 Fed. Rep., 86 (1893). Affirming 51 Fed. Rep., 334.

198. Directors Not Concluded, as to Their Personal Claims, by Action of Their Boards in Which They Do Not Concur.

A director is not estopped from proceeding in his individual right as the holder of the company's securities by the fact that he was a member of the board of directors at the time a plan of reorganization was passed. P, the holder of securities in a company, the payment of which was guaranteed by another corporation, D, brought suit against D to recover the amount of coupons due and interest from the date of maturity of the same. D filed an affidavit of defense denying that there could be a recovery of interest upon interest, and averring that P was estopped from any recovery by the fact that he was a member of the board of managers when said board adopted the scheme proposed by D for the reduction of the securities guaranteed by D, and by the further fact that the said board recommended the adoption of the plan to the stock and bond holders. It was conceded that C had opposed the plan at the meeting of the board. Held, that P was not bound by the action of the board in which he did not concur.[89]

199. Maladministration and Frauds of Directors.

The directors of a saving fund are liable to the depositors for maladministration, but directors who did not participate, who never took their seats in the board and against whom there is no allegation of knowledge of the frauds, are not so liable.[90]

A director is not liable to a creditor of a bank for negligence in allowing the president to embezzle all its assets, where such director received no pay, and once or twice a week attended to the discounts, saw how much money was on hand, and, once a year, counted the cash and securities.[91]

Where a director of a corporation is informed of a fraud perpetrated against it by its officers before he became a director, and agrees with those officers to participate in the profits of the fraud, he becomes liable to the corporation and its assignee for the benefit of creditors for all the losses of the company caused by the fraud.[92]

(89) Phila. & Reading R. Co. *v.* Love, 23 W. N. C., 537 (1889).

(90) Maisch *v.* Seamen's Sav. Fund Soc., 5 Phila., 30; Leffman *v.* Flanigan, Ibid, 155, 419.

(91) Swentzel *v.* Penn Bank, 147 Pa., 140 (1892).

(92) Freeman et al. *v.* Stine et al., 38 Leg. Int., 268 (1881).

Where directors, by resolution, illegally authorize the payment of money, the statute of limitations begins to run in their favor from the date of the resolution, and not from the date of the payment of such money, and six years' omission to proceed against directors for misfeasance would be a bar to an action against them for the misuser of the corporate property.[93]

Where a deed has been executed in the name of a corporation in pursuance of an unauthorized act of the company's directors, the corporation may inquire into the validity of the consideration of the deed. In doing so it is not attempting to set aside its own act, but the unauthorized act of its directors.[94]

Where a director loans money to a corporation to pay fraudulent dividends, he may not recover any part of his loan until the stockholders are fully paid.[95]

A claim that the debts of the directors should not be paid out of the assigned estate of the corporation on the ground that the total debts of the company were in excess of the capital stock, cannot be sustained where the auditor reports that he was unable to state that the directors did, during their terms of office, contract a larger indebtedness than an amount equal to the capital stock of the company.[96]

When stockholders show that the directors are about improperly to discontinue a suit in a foreign jurisdiction involving two million dollars, a new suit for which sum will be barred by the statute of limitations, a court of equity will appoint a receiver of the corporation.[97]

200. Knowledge of Calls Made.

Directors will be presumed to have knowledge of calls made during their terms of office.[98]

201. Proceedings Against Directors for Mismanagement, Fraud or Ultra Vires Acts.

Shareholders are entitled to proceed by bill against the direc-

(93) Link et al. *v.* McLeod, 194 Pa., 566 (1900).
(94) Temp. Mut. Benefit Assn. *v.* Home Friendly Soc., 187 Pa., 38 (1898).
(95) Kisterbock's Appeal, 51 Pa., 483 (1866).
(96) Trevose Model Brick Co.'s Estate, 159 Pa., 496 (1894).
(97) Hazzard *v.* Credit Mobilier, 6 W. N. C., 417 (1879).
(98) Spellier Elec. Time Co. *v.* Geiger, 147 Pa., 399 (1892).

tors of a corporation for the mismanagement of its affairs and fraudulent and *ultra vires* acts.[99] The proceedings must be in equity so as to protect the interests of the corporation as the trustees for all the stockholders and creditors,[100] and the corporation must be joined as a party.[1] The stockholders cannot proceed separately and at law.[2]

Creditors of corporations must proceed in the same manner. A bill will not lie by a single creditor, unless some special damage not common to the other creditors was incurred by such creditor.[3]

Directors, however, are liable to the stockholders only for gross mismanagement.[4]

A stockholder may enjoin the directors of a corporation from using its funds to defend a suit in which the corporation is not interested [5] or from discounting notes in a different manner from that prescribed in the act incorporating the company.[6]

A settlement by the directors of a corporation of a claim against the company is binding on a stockholder unless he affirmatively shows that the action of such board was fraudulent, and in bad faith to the corporation.[7]

202. Refusal of Directors to Institute Legal Proceedings.

"If the corporation was unable to act by reason of the misconduct or disability of its agents, and there was not sufficient time to remove them and appoint others in their stead, the stockholders might invoke the aid of a court of equity to protect the corporate property and their own equitable right in it. But a mere refusal of the directors of a corporation, acting in good faith, to institute legal proceedings in its name to redress an alleged wrong

(99) Watt's Appeal, 78 Pa., 370 (1875); Spering's Appeal, 71 Pa., 24 (1872); Gravenstine's Appeal, 49 Pa., 310 (1865).

(100) Craig *v.* Gregg et al., 83 Pa., 19 (1876); Warner *v.* Hopkins, 111 Pa., 328 (1885).

(1) Brown *v.* Orr et al., 112 Pa., 233 (1886); Fletcher et al. *v.* Titusville Gas & Water Co., 8 Phila., 559 (1871); Warner *v.* Hopkins, 111 Pa., 328 (1885).

(2) Craig *v.* Gregg et al., 83 Pa., 19 (1876); McAleer *v.* McMurray, 58 Pa., 126 (1868); Caldwell *v.* Boyd, 57 Pa., 321 (1868).

(3) Warner *v.* Hopkins, 111 Pa., 328 (1885).

(4) See Sec. 189, Common Law Liability of Directors.

(5) Norristown Traction Co. *v.* Shannon, 7 Montg. Co., 86 (1891).

(6) Manderson *v.* Commercial Bank of Pa., 28 Pa., 379 (1857).

(7) Chambers *v.* McKee & Bros., 185 Pa., 105 (1898).

against it is not a sufficient ground for the interference of a court of equity at the instance of a stockholder, as it often involves the exercise of a sound discretion to determine whether it is expedient to begin litigation for an actionable injury. If, however, the directors were the authors of the wrong, or their refusal to bring suit was in excess of their discretionary powers, such interference would be justified." [8]

"The right of an individual stockholder to act for the corporation is exceptional, and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and refusal to act are imperative requisites.

"And the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a non-performance of a manifest official obligation amounting to a breach of trust; Beach on Private Corpns., Sec. 878. There must be averred and proved an actual application to the directors, and a refusal by them to bring suit or to allow the plaintiff to do so in the corporate name, and where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation: Beach, Sects. 882, 885 . . . . The authorities are agreed that if it sufficiently appears that a demand would be useless it need not be made: Beach, Sec. 886." But such a condition does not sufficiently appear from an inference that, by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. A mere averment that the lessee owned a majority of the stock of the lessor and elected its officers who allowed themselves to be "kept in absolute ignorance of its business" is insufficient.[9]

A bill to enforce the rights of a corporation must be filed by and in the name of the corporation, and if filed by a stockholder it must contain an averment of a demand made upon the corporation to institute a suit, and a refusal of the corporation to do so,[10] but such demand need not be shown where the circumstances are such that it is evident that such an application would not have availed.[11] It seems, however, that the fact that the defendant is president of the corporation and holder of a large majority of its

(8) South W. N. Gas Co. *v.* Fayette Fuel Gas Co., 145 Pa., 13; 29 W. N. C., 247 (1891).

(9) Wolf *v.* P. R. R. Co. et al., 195 Pa., 91 (1900). See South W. N. Gas Co. *v.* Fayette Fuel Gas Co., 145 Pa., 13 (1891).

(10) Holton *v.* New Castle Railway Co., 138 Pa., 111 (1890).

(11) Barr *v.* Pgh. Plate Glass Co., 40 Fed. Rep., 412 (1889).

stock does not afford a presumption that an application would have been useless.[11*]

A settlement by the directors of a corporation of a claim against the company is binding on a stockholder unless he affirmatively shows that the action of such board was fraudulent or in bad faith to the corporation.[12]

Though a stockholder of a corporation may interfere in equity for the protection of the company, yet something less or more than what is allowed by the charter must have been done by the managers or directors to authorize such interference, and where a debt authorized by the company is created by and with the consent of the stockholders and directors and a judgment confessed therefor, a consenting stockholder is not entitled to an injunction against an execution issued thereon.[13]

203. Compensation of Directors.[14]

204. Miscellaneous.

Directors of a railroad company have no power to release the subscribers to its capital stock from liability on their subscriptions.[14*]

Directors may not ratify an act of the president of the company which act the board of directors itself had no power to perform.[15]

If the directors of a corporation become the makers and endorsers of notes for the purpose of raising money for the use of the company, they are mutually responsible to each other, and if one of them pays the notes, the others are liable to contribution.[16]

The fact that a director of a corporation is responsible for a portion of a debt due by the company does not invalidate a compromise with a debtor in favor of which such director voted, but his liability remains unaffected.[17]

Where a director of a bank acting upon information obtained in his official relation with the bank, withdraws, on the day of sus-

(11*) Law *v.* Fuller, 217 Pa., 439 (1907).
(12) Chambers *v.* McKee & Bros., 185 Pa., 105 (1898).
(13) Gravenstine's Appeal, 49 Pa., 310 (1865).
(14) See Sec. 151.
(14*) Bedford R. R. Co. *v.* Bowser, 48 Pa., 29.
(15) Crum's Appeal, 66 Pa., 474.
(16) Slaymaker *v.* Gundacker, 10 S. & R., 75.
(17) Baird *v.* Bank of Washington, 11 S. & R., 411.

pension of the bank, the deposit of a partnership of which he was a member, he will be ordered to repay it.[18]

The acts or declarations of a director will not bind or in any manner affect it, unless they are shown to be within the scope of his ordinary powers or of some special agency.[19]

(18) Swentzel *v.* Penn Bank, 147 Pa., 140 (1892).
(19) Allegheny County Workhouse *v.* Moore, 95 Pa., 408 (1880).

CHAPTER XII.

MEETINGS OF STOCKHOLDERS—ELECTIONS.

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231. Changes of Offices and Places of Meeting.

205. Stockholders May Act Only at Corporate Meetings.

Stockholders can hold elections and transact corporate business only at corporate meetings duly called and convened.[1] It seems, however, that all the stockholders and officers of a corporation may, by signing an authorization of the making of a contract by its president, estop the corporation from pleading a want of power in that officer.[2]

(1) Langolf *v.* Sieberlitch, 2 Pars., 64 (1851); Com. *v.* Cullen, 13 Pa., 132 (1850); Granger *v.* Grubb, 7 Phila., 350 (1870); Shortz *v.* Unangst, 3 W. & S., 45 (1841); Carpenter *v.* Burden, 2 Pars., 24 (1843).

(2) Sanderson *v.* Imperial Underwear Co., 15 D. R., 695 (1905).

206. Corporate Meetings.

The meetings of corporations must be held in accordance with the provisions of the charters or by-laws of such corporations,[3] but the annual meetings for the election of directors of insurance companies must be held in the month of January of each year,[4] and those of street railway companies on the second Monday of January.[5]

Where there is no provision in the charter or by-laws, usage may dictate the method of conducting such meetings.[6] The board of directors may fix the time for the meetings of stockholders, where the same is not prescribed by the charter or by-laws,[7] and where the by-laws require that the board of directors shall appoint a time and place for holding the annual meeting and election, and the directors fail to name such time and place, a court of equity will decree that an election of officers be held under the direction of a master.[8]

Where an annual meeting of the stockholders of a corporation has been regularly called, but has not been held through default, mandamus will not issue against the secretary and president of the company requiring them to call a special meeting for the purpose of electing directors, where the board of directors have taken no action relative to such call. The president and secretary have no power to call meetings unless given the same by the by-laws.[9]

Where a church corporation has no by-laws and the date of its annual meetings is not established by any custom, evidence of the date of meetings of a faction of the congregation after its division is inadmissible to show a custom as to the time of holding annual meetings before the division.[10]

The charter of a company provided that no business should be transacted at a special meeting, unless a majority of the stockholders were present in person or by proxy. Held, that this did

(3) Brown *v.* Elec. Min. Machine Co., 39 Pitts, L. J., 343 (1892); Com. *v.* Keim, 15 Phila., 1 (1881); 38 Leg. Int., 32.

(4) See Sec. 1279.

(5) See Sec. 1501.

(6) Juker *v.* Com., 20 Pa., 484 (1853).

(7) Com *v.* Smith, 45 Pa., 59 (1863).

(8) Anderson *v.* Eltonhead, 26 W. N. C., 95 (1890). See Sec. 222.

(9) Streuber *v.* St. Mary's Pipe Co. et al., 33 Pa. C. C., 46 (1906).

(10) Firestone *v.* First Slavish etc., Church, 215 Pa., 8 (1906).

not apply to elections specially ordered by reason of the election having been omitted on the day mentioned in the charter.[11]

A failure to elect officers at the time fixed in the charter will not dissolve the corporation. Its functions may be suspended thereby, and restored by subsequent elections.[12]

Unanimity in the government of a corporation is not required, unless the charter so provides. It is one of the consequences of being a stockholder or member of a corporation that the will of the majority shall govern, unless the fundamental articles provide otherwise.[13]

207. Meetings Held Outside of the State.

In all cases where any company has been incorporated under the laws of this State, and a majority of the directors, corporators or stockholders thereof are citizens of any other State, said corporation may be organized, and all the meetings of such corporators, directors or stockholders, held in such place, whether in this State or elsewhere, as such majority, may from time to time, appoint: *Provided, however,* That the annual election for officers of such corporation shall be held in the State of Pennsylvania, at such time and place and upon such notice, by publication in the newspapers of this State, as the by-laws of such corporation may, from time to time, determine.[14]

The rule that a corporation must perform its corporate acts within the State or sovereignty that gave it life, does not apply to the action of a beneficial association incorporated in Pennsylvania, and having subordinate councils and members throughout the United States, in levying a per capita tax on its members at a corporate meeting held outside the State, such tax being within the corporate powers and necessary to provide revenue upon which the existence of the corporation depends.[15]

(11) McCalmonts *v.* P. &. R. R. Co., 15 Phila., 153 (1881); Gowen's Appeal, 10 W. N. C., 85 (1881).

(12) Rose *v.* Tpk. Co., 3 Watts, 46 (1834); Lehigh Bridge Co. *v.* Lehigh Coal Co., 4 Rawle, 9 (1823).

(13) McKean *v.* Biddle et al., 181 Pa., 361 (1897); O'Neil et al. *v.* H. M. & F. Pass. Ry. Co., 9 D. R., 2 (1900).

(14) Act November 27, 1865, P. L., 1866, p. 1228.

(15) Derry Council etc. *v.* State Council, Jr. O. U. A. M., 197 Pa., 413 (1900).

208. Notice of Corporate Meetings.

The time and manner of notice of meetings of stockholders of corporations may be prescribed by the by-laws, but notice of the annual meetings of insurance companies must be made by publication for three insertions in two newspapers—See Sec. 1279—and notice of such meetings of street railway companies must be published for at least two weeks in one or more newspapers published in the county where the railroad is located. See Sec. 1501.

Action taken at meetings of stockholders not held on charter days, or days fixed by the by-laws, of which meetings no notice was given, is avoidable by the corporation, but advantage of the irregularity may not be taken by an outside party.[16]

Where a de facto president of a corporation who has held office for a year without any quo warranto proceedings having been brought against him, calls a meeting of the stockholders, the validity of the meeting cannot be attacked for any insufficiency of the call.[17]

Notices of special meetings should set forth the nature of the business to be transacted at such meetings;[18] but when such a meeting is called to pass upon the making or not making of a certain lease, it is sufficient that full information as to the terms of the lease be given in the notice without reference to the negotiations leading up to the offer of the lease.[19]

In quo warranto proceedings instituted by a stockholder against B, requiring him to show by what right he held the office of trustee of a corporation, it appeared that B had been elected such trustee under an amendment of the charter which had been accepted at a meeting of which notice had not been given to all the members of the corporation. Held, that the acceptance of the amendment was valid.[20]

The sixty days' notice of meetings called to pass upon questions involving the increase of capital stock, provided for by the Con-

(16) Gordon *v.* Preston, 1 Watts, 385 (1833); Kersey Oil & Min. Co. *v.* Oil Creek etc., Co., 5 W. N. C., 144 (1877); Brown *v.* Elec. Min. Machine Co., 39 Pitts. L. J., 343 (1892).

(17) St. Nicholas Greek Catholic Church of Plymouth, 29 Pa. C. C., 193 (1903).

(18) Ehrenfeldt's Appeal, 101 Pa., 186 (1882); Cook on Corpns., Sec. 595.

(19) Strunk *v.* Owen, 199 Pa., 78 (1901).

(20) Com. *v.* Cullen, 13 Pa., 133 (1850).

stitution, may be waived,[21] but the meetings to pass upon such proposed increases may not be waived.[22]

209. Quorum.

Every such corporation may determine, by its by-laws, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting to constitute a quorum; if the quorum is not so determined, a majority in interest of the stockholders shall constitute a quorum.[23]

Where a corporate act is to be done by a definite number of persons, a majority of that number is necessary to constitute a quorum, and no act can be done unless such a majority be present; but where the act is to be performed by an indefinite number, a majority of those who appear at a meeting duly called, whether the number present is a majority of the whole number or not, may act and such action will bind the whole, whether present at the meeting or not. The distinction is between a definite and an indefinite number.[24]

A person present at a meeting and not voting may be counted for the purpose of making a quorum.[25]

210. Adjourned Meetings.

Stockholders may legally consider and determine at an adjourned meeting business proposed at the annual meeting.[26] And a person who has been chosen to preside at a corporate meeting is entitled to call an adjourned meeting to order, and to continue to preside, unless superseded in some orderly and recognized parliamentary manner.[27]

211. Power to Hold Elections.

The power to hold elections is an incident of every corporation.

(21) Bellefonte *v.* Buffalo R. R. Co., 2 Chest., 128 (1883).
(22) Tally-on-Top Sales Book Co., 2 Lack. L. N., 40 (1895).
(23) Sec. 6, Act April 29, 1874, P. L., 77.
(24) In re Petition of the First Presb. Church, 6 W. N. C., 421 (1878); Craig *v.* The Church, 88 Pa., 47.
(25) Com. *v.* Wickersham, 66 Pa., 134 (1870).
(26) Com. *v.* Cullen, 13 Pa., 133 (1850).
(27) Com. *v.* Patterson, 158 Pa., 476 (1893).

It is not necessary that such a power should be expressly conferred by the charter.[28]

A corporation in the hands of a receiver may hold meetings and elect officers, without leave of court.[29]

212. Proxies.

Stockholders of all corporations of this commonwealth, wherever residing, who shall be entitled to vote at any corporate meeting or election thereof, shall have and be possessed of the right and power to vote thereat by proxy duly executed by the stockholder, either with or without notarial or other acknowledgment, but properly attested by the signature of a witness, and that one person may be constituted and act as proxy for any number of stockholders: *Provided, however,* That proxies dated more than two months prior to any such meeting or election shall not confer right to vote thereat.

Sec. 2. That anything contained in any general or special law inconsistent with this act be and the same is hereby repealed.[30]

All power to vote by proxy, in any association incorporated by any authority in this Commonwealth, or by the former proprietary government, shall be obtained and dated within six months previously to the time of holding the election or meeting of stockholders at which such proxy shall be presented, and shall not be used for any purpose or purposes except those therein expressed, nor shall any such proxy be given in blank, nor substitution thereof to a third person be admitted, any law or usage to the contrary notwithstanding: *And provided also,* That nothing herein contained shall be so construed as to alter or affect the provisions of the act entitled "An act regulating banks," so far as relates to the dates of proxies.[31]

In all elections of officers in an association or company (incorporated as aforesaid) hereafter to be held by virtue of any law of this Commonwealth, whenever any person shall offer to the judges of such election any vote or votes, as attorney, proxy or agent for any other person, such person being required thereto

(28) Com. *v.* Gill, 3 Whart., 228, 247 (1837); Wright *v.* Com., 109 Pa., 560 (1885).

(29) Com. ex rel. *v.* Overholt, 23 Pa. Super. Ct., 199 (1903).

(30) Act March 5, 1903, P. L. 14.

(31) Sec. 1, Act March 28, 1820, P. L., 7 Sm., 320.

by any judge of such election, or any stockholder in such association or company, shall, before his vote or votes shall be received, take and subscribe the following oath or affirmation: "I, ———, do solemnly swear (or affirm) that I have no interest, directly or indirectly, in the share upon which I shall vote at this election, that those shares are, to the best of my knowledge and belief, truly and in good faith owned by the persons in whose names they now stand, and that in voting at this election, I have not transferred any of the said shares, or caused them to be transferred, in trust or otherwise, for the purpose of increasing the votes at this election; and that I shall not violate in any manner, directly or indirectly, any provision of the act of incorporation, which limits the number of votes a stockholder may give in his own right." And the judges of such election are authorized to administer the aforesaid oath (or affirmation); and the said oath and all authorities or powers of attorney to vote by proxy, or as agent, shall be filed and preserved in the office of such association or company; and if any person shall wilfully and absolutely swear or affirm falsely in taking any oath or affirmation prescribed by this act, such person so offending shall, upon due conviction thereof, be subject to the pains and penalties which are by law prescribed for the punishment of wilful and corrupt perjury.[32]

None of the provisions of the act entitled "An act to regulate proxies," passed the 28th day of March, 1820, shall be deemed to extend to any association incorporated for religious, charitable or literary purposes.[33]

. . . . All elections for directors or trustees shall be by ballot and every share of stock shall entitle the holder thereof to one vote in person or by proxy, to be exercised as provided in this section.[34]

(Voting on increases of capital stock). . . . Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting; nor shall any proxy be received, or entitle the holder to

(32) Sec. 2, Act March 28, 1820 (7 Sm., 320).

(33) Act March 31, 1821 (7 Sm., 446).

(34) Act April 25, 1876, P. L., 47, amending Sec. 10, Act April 29, 1874.

vote, unless the same shall bear date and have been executed within four months next preceding such election or meeting.[35]

(Voting by shareholders of banks.) In all elections for directors and otherwise, each shareholder shall be entitled to one vote on each share of stock held by him; shareholders may vote by proxies executed in writing. No officer, clerk, teller or bookkeeper of the corporation shall act as a proxy.[36] . . . .

Where a will provided that stock devised should be voted by the testator's son, one of the executors, who should be given a proxy for that purpose by the other executor, it was held that the son could not vote the stock without such proxy,[37] but in a later proceeding the other executor was ordered to give such a proxy.[38]

Prior to the passage of the Act of March 5, 1903, P. L., 14, supra, members of a corporation had no right to vote by proxy at a corporate election unless such right was expressly conferred by the charter or by a valid by-law of the corporation except in the cases of certain corporations specially provided for by law.[39]

A proxy to vote at a corporate election "and at any meeting of the stockholders" confers on the holder a right to vote on all motions put during the meeting, with like effect as could his constituent were he present.[40]

Proxies may be authorized by by-laws, even when the charter is silent.[41]

Proxies are revocable at will.[42]

Under a by-law of the adoption of which a stockholder had no notice, requiring all proxies to be acknowledged before a notary and attested by the secretary of the company, held, that the votes cast by such stockholder by proxy, which were prepared before

(35) Section 2, Act February 9, 1901, P. L., 4. Proxies of shareholders of railroad companies must be executed three months before the election at which they are used. Sec. 5, Act February 19, 1849, P. L., 81.

(36) Sec. 14, Act May 13, 1876, P. L., 161.

(37) Tunis *v.* Hestonville, M. and F. P. R. Co., 149 Pa., 70 (1892). See Sec. 219.

(38) Lafferty's Estate, 154 Pa., 430 (1893).

(39) Com. *v.* Bringhurst, 103 Pa., 134 (1883); Brown *v.* Com., 3 Grant, 209 (1856); Wilson *v.* Amer. Academy of Music, 2 Pa. C. C. 280 (1885); Craig *v.* The Church, 88 Pa., 47 (1878).

(40) Forsyth *v.* Brown, 33 W. N. C., 72 (1893).

(41) Com. *v.* Detwiller, 131 Pa., 614, 623 (1890).

(42) Vanderbilt *v.* Bennett, 6 Pa. C. C., 193 (1887).

the adoption of the by-law and did not conform thereto, might not be rejected, there being no requirement in the charter for the acknowledgment and attestation of proxies.[43]

The charter of a corporation authorized votes by proxy in elections of directors, and authorized the directors to adopt such by-laws, rules and regulations as they might deem conducive to the well being of the corporation. Held, that the directors might, by by-laws, give the right to stockholders to vote by proxy on matters arising at a meeting of stockholders not held for the election of officers.[44] A proxy cannot vote when the owner of the stock is present and votes.[45]

A railroad company deposited stocks of another railroad company with a trustee under an agreement in writing, reserving to the company depositing the same the right to vote the stock, the trustee agreeing to deliver proxies for that purpose. The railroad company depositing the stock demanded a proxy to permit it to vote the same for a merger of the company issuing the stock with two other railroad companies. The trustee refused to deliver such a proxy on the ground that it had no right to sell or pledge the trust estate, or to vote it out of existence in the shape it came into its hands. Held, that the trust was a special and not a simple one, and that the duties of the trustee were fixed by the agreement, and a decree in favor of complainants was granted.[46]

213. Votes.

Originally, as appears in the Introductory Chapter, each member of a corporation had one vote without regard to the number of shares owned by him, and in the early acts of incorporation passed in Pennsylvania, the power of voting stock was almost invariably limited. For instance, the Act of January 16, 1815, P. L., 37, incorporating a turnpike company, provides that holders of one share and not more than two shares shall have one vote; over two shares and not exceeding ten shares, one vote for every two shares; for every four votes above ten and not exceeding thirty, one vote; and so on, no shareholder, however, to cast

(43) Com. *v.* Coxe, 1 Foster, 89 (1873).
(44) Wilson *v.* Amer. Acad. of Music, 2 Pa. C. C., 280 (1886).
(45) Com. *v.* Patterson, 158 Pa., 476 (1893).
(46) Penna. R. R. Co. *v.* Penna. Co. for Ins. on Lives, etc., 205 Pa., 219 (1903).

more than thirty votes. This practice continued very generally as late as the early '60's, though the Act of April 13, 1846, P. L., 312, incorporating the Pennsylvania Railroad Company, provides that each share of stock shall entitle the holder to one vote.

The Act of May 20, 1865, P. L., 1847, provides that the stockholders of all railroad companies accepting its provisions shall have one vote for each share of stock. This act was made applicable to bridge and hall associations by Act of March 14, 1867, P. L., 36.

In all elections or meetings of stockholders of any turnpike or plank road or bridge company, incorporated under any law of this Commonwealth, every stockholder shall be entitled to one vote for every share of stock by him or her held in such corporation, to be cast either in person, or by proxy duly constituted by power of attorney in writing, attested by one or more subscribing witnesses. . . . .[47]

All elections for directors or trustees shall be by ballot, and every share of stock shall entitle the holder thereof to one vote.[48]

Where the statutes are silent upon the subject of the number of votes to be cast by shareholders, the by-laws may provide what voting power such holders may have.[49] Where there is neither statute nor by-law, it is probable that, in the case of corporations not for profit, which sometimes have capital stock, the courts would hold that each member had a vote, without regard to the shares of stock he might hold,[50] and in the case of business corporations that stockholders should have one vote for each share held by them, there being no custom to the contrary.

(47) Sec. 1, Act June 11, 1879, P. L., 139.

(48) Act April 25, 1876, P. L., 47, amending Sec. 10, Act April 29, 1874. The right to cast one ballot for each share is given to different classes of corporations as follows: Banks: Sec. 14, Act May 13, 1876, P. L., 161; Railroads: May 20, 1865, P. L., 1847; Bridge and Hall Associations: March 14, 1867, P. L., 36; Street Ry. Cos.: Sec. 9, Act May 14, 1889, P. L., 211. The Acts of March 22, 1887, P. L. 8, providing for the incorporation of traction companies, and May 25, 1885, P. L., 2, providing for the formation of natural gas companies do not expressly give one vote for each share, but as they both speak of the shares as being voted, and not the shareholders as voting, that was probably the intention.

(49) Com. *v.* Detwiller, 614, 625 (1890); Cook on Corpns., Sec. 609.

(50) Com. *v.* Conover, 10 Phila., 55 (1873).

214. When Stock Votes May be Taken.

Whenever a stock vote is duly demanded or required, or any subject submitted to the stockholders of any corporation of this Commonwealth for their action at any annual or special meeting, such vote may be taken at and certified to such meeting, or any adjournment thereof; or, if the annual election for directors shall, under provisions of the charter or laws governing such corporation, be held at a time which shall be within thirty days after the annual or special meeting at which such subject shall be submitted to the stockholders, then the vote on such subject may be taken at the same time and place, by the same persons, and in the same manner as the vote for directors or managers of such corporation shall be taken; or, if under provisions of the charter or laws governing such corporations, the annual election for directors or managers thereof shall not be held at a time which shall be within thirty (30) days after the meeting at which such subject shall be submitted to the stockholders, then the stock vote upon such subject may be taken at any time within thirty days after such meeting, by three judges to be appointed, and at a time and place to be designated by the stockholders at said meeting, and the result of the vote shall be certified by the judges, under oath or affirmation, and their certificates shall be filed with the secretary of such corporation.

Anything in any general or special act contained in conflict with the provisions of this act, be and the same is hereby repealed.

215. Cumulative Voting.

In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer.[52]

In all elections for directors, managers or trustees of any corporation created under the provisions of this statute, or accepting its provisions, each member or stockholder or other person having a right to vote, may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates as he may prefer, that is to say: If the said member or stockholder or other person having the right to vote, own one share of stock or

(51) Act March 24, 1903, P. L. 50.
(52) Sec. 4, Art. 16, Constitution of Penna.

has one vote, or is entitled to one vote for each of six directors by virtue thereof, he may give one vote to each of said six directors, or six votes for any one thereof, or a less number of votes for any less number of directors, whatever may be the actual number to be elected, and in this manner may distribute or cumulate his votes as he may see fit; all elections for directors or trustees shall be by ballot, and every share of stock shall entitle the holder thereof to one vote, in person or by proxy, to be exercised as provided in this section.[53]

Sec. 4 of the 16th Article of the Constitution of 1874, providing for cumulative voting, does not apply to corporations existing prior to the adoption of said Constitution or which have not accepted its provisions.[54] But it does apply in the case of a corporation chartered by a decree of court prior to the adoption of the Constitution of 1874, and of a class described as the first class in the Corporation Act of April 29, 1874, which, after the adoption of the Constitution, amended its charter by a decree of court under the provisions of said Act of 1874.[54*]

The board of directors of a corporation for profit may not bind the stockholders to cumulative voting by accepting the provisions of the Constitution in the manner provided by the Act of May 22, 1878, P. L., 84. The said act applies only to charitable corporations having no stockholders vested with property rights. Corporations having such stockholders can adopt said provision of the Constitution only in the manner prescribed by the Act of April 17, 1876, P. L., 33, by authority of a meeting of the stockholders called for the purpose.[55]

The 4th Section of Article 16 of the Constitution is not merely directory, but takes effect without legislation. It applies only to private corporations, but a railroad corporation is a private company within its meaning.[56]

It is not necessary to the right of cumulative voting that notice of an intention to exercise the same shall be given.[57]

(53) Act of April 25, 1876, P. L., 47, amending Sec. 10, Act of April 29, 1874, P. L., 78.

(54) Hays et al. *v.* Com., 82 Pa., 518 (1876); Baker's Appeal, 109 Pa., 461 (1885); Dick *v.* Lehigh Valley R. R. Co., 4 D. R., 56 (1895).

(54*) Com. ex rel. *v.* Flannery, 203 Pa., 28 (1902).

(55) Baker's Appeal, 109 Pa., 461 (1885).

(56) Pierce *v.* Com., 104 Pa., 150 (1883).

(57) Pierce *v.* Com., 104 Pa., 150 (1883).

Where the charter of a corporation, granted prior to 1874, provided that salaried officers should not be elected directors, the fact that after the passage of the Act of May 20, 1891, P. L., 101, which permitted such election, salaried officers were elected directors, does not make the corporation subject to the provision of the Constitution relating to cumulative voting.[58]

An election held for seven directors of a private corporation created under the Act of April 29, 1874, at which the cumulative method of voting was employed and only five directors received the necessary pluralities, is valid as to the five so elected, and they have full power to act as a board. Whether in the event of a second election to fill the vacancies, the cumulative system could be again used, not decided.[59]

At a stockholders' meeting where cumulative voting is permitted in the election of directors, those candidates are elected who, beginning with the one receiving the highest number of votes, and counting downward until the full board is made up, have received the most votes; but if, in counting downward, and before the full board is made up, a tie is found, so that the remaining places on the board cannot be filled without rejecting one or more of the candidates who are in the tie, in that case only those candidates are elected on that ballot who receive, each, more than any candidate in the tie, and another ballot must be had to fill the vacant places, when the stockholders may again cumulate their votes. Votes may not be added to the ballot after the ballot has been announced.[60]

Any amendment under the Act of April 29, 1874, and its supplements, of the charter of a corporation not for profit, formed prior to the adoption of the Constitution of 1874, is such a renewal of the entire charter, as of the date of the amendment, as to subject the corporation to Art. 16, Sec. 4 of the Constitution, which authorizes cumulative voting. "In such a state of facts, a formal acceptance of the Constitution by the older corporation is not necessary." [61]

Where the stockholders of a turnpike company cast one vote for each share owned thereby, respectively, under the provisions

(58) Com. *v.* Butterworth, 160 Pa., 55 (1894).
(59) Wright *v.* Com., 109 Pa., 560 (1885).
(60) Forsyth *v.* Brown, 13 Pa. C. C., 576 (1893).
(61) Com. *v.* Flannery, 26 Pa. C. C., 433 (1901); 203 Pa., 28 (1902).

of the Act of June 11, 1879, P. L., 139, though their charter provided differently, held that this did not, of itself, place the company under the Constitution of 1874 so as to authorize cumulative voting.[62]

Where the stockholders of a State Normal School, organized under the Act of May 20, 1857, P. L., 581, obtained a charter as a private corporation from a Court of Common Pleas, the vote for trustees of such corporation may be cumulated.[63]

216. Voting of Shares as Between Vendor and Vendee.

An agreement by a vendor of stock which is to be delivered after an election, that he will vote as the vendee desires, is not illegal.[64]

A person owning stock in a corporation entered into a contract of present sale of the stock, and parted possession with it by delivery to a third person in escrow until the vendee should comply with the terms of the sale, and agreed that, in the meantime, the right to vote the stock should be in the vendee. Held, that the vendor was not a present owner of the stock in any such sense as to entitle him to vote.[65]

217. Voting Trusts.

Where the stockholders of a corporation voluntarily agreed to perpetually vest in trustees the right to vote the stock at all meetings of the corporation, held, that such agreement was void as against public policy and contrary to the provisions of the General Railroad Act of February 19, 1849, providing that the right to vote is incident to the ownership of stock, and, further, that such an agreement, if valid, amounted to no more than a proxy, revocable at will,[66] and as, under the Act of March 5, 1903, P. L., 14, a proxy issued more than two months prior to an election is void, the trustees cannot exercise their powers after two months from the execution of the agreement, even when there is no ex-

(62) Hunsicker *v.* Perkiomen & S. Tpk. Co., 1 Montg. Co. L. R., 41 (1884).

(63) Com. *v.* Yetter, 190 Pa., 488 (1899).

(64) Vanderbilt *v.* Bennett, 2 Ry. & Corp. L. J., 409 (1887); 6 Pa. C. C., 193 (1887).

(65) Com. ex rel. Langdon *v.* Patterson, 158 Pa., 476 (1893).

(66) Vanderbilt *v.* Bennett, 6 Pa. C. C., 193 (1887).

press revocation;[67] but where the stock of an insolvent corporation was transferred to trustees by the holders to secure the interests of corporate creditors in a reorganization scheme, under an agreement that the trustees should vote the stock, an injunction to restrain the trustees from voting was refused.[68]

218. Evidence of Right to Vote.

The certificate of stock and transfer books, or either, of any corporation of this Commonwealth, shall be *prima facie* evidence of the right of the person named therein to vote thereon as the owner, either personally or by due proxy. If, however, objection is taken by an actual stockholder at the time the ballot is tendered, accompanied by a written statement under oath that the person in whose name such stock stands on such certificate, or transfer books, and who is offering to vote thereon either in person or by proxy, is not the owner thereof, either in his own right or as active trustee with the character of his trusteeship disclosed on the face of said certificate or transfer books, in connection with his name, it shall be the duty of the judges of election to inquire and determine summarily whether the facts are as represented in such statement, and, if so, the vote or votes so tendered shall be rejected: *Provided, however,* That nothing in this section shall be held to prohibit executors, administrators, guardians or trustees created by last will and testament, or by decree of court, from voting on stock standing in the name of a decedent, minor or other beneficiary.[69]

In cases where, under the terms of the preceding section, the person named in the certificate, or transfer books, is not permitted to vote, the beneficial owner of such stock shall have the right to vote thereon upon furnishing to the judges of election satisfactory evidence of ownership.[70]

Where, at a corporate election, objection is made in writing under oath to the ballot of a person who claims the right to vote on shares standing in his name in the certificate of stock and on

(67) Morgan *v.* Hartley Oil & Gas Co. et al., 30 Pa. C. C., 22 (1904).

(68) Shelmerdine *v.* Welsh, 20 Phila., 199 (1890); 8 Pa. C. C., 330.

(69) Sec. 1, Act May 26, 1893, P. L., 141, amending and superseding Act May 7, 1889, P. L., 102.

(70) Sec. 2, Act May 26, 1893, P. L., 141, amending Act of May 7, 1889, P. L., 102.

the transfer book of the corporation, such certificate and transfer book are, under the Act of May 7, 1889, (and under the Act of May 26, 1893, which re-enacts the provisions of the Act of 1889 in this regard) *prima facie* evidence of his right to vote such shares, and are conclusive in the absence of evidence to the contrary.[71]

The affidavit of an actual stockholder, making objection when the ballot is tendered and setting out that the stock is not owned absolutely and *bona fide* by the person in whose name it stands in the certificate and transfer book, is not evidence either at common law or by statute, but merely lays the ground for an inquiry.[72]

219. Where Executors, Administrators, Guardians or Trustees Differ as to How Stock Shall be Voted it May be Voted by the Majority.

From and after the passage of this act, executors, administrators, guardians, and trustees, whether created by last will and testament or by decree of the proper court, shall have the same right and power, either in person or by proxy, at all corporate meetings, to vote any and all shares of stock, by them held in such fiduciary capacity, in any corporation in this Commonwealth or organized under the laws of the same, as the deceased, or legal owner thereof had in his lifetime or during his legal ownership thereof. And where such stock is certified, or stands on the books of such corporation in the name of, or has passed by operation of law or by virtue of any last will and testament to, more than two such executors, administrators, guardians or trustees, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such executors, administrators, guardians and trustees, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted.[73]

(71) Com. *v.* Dalzell, 152 Pa., 217 (1893).

(72) Com. *v.* Dalzell, 152 Pa., 217 (1893).

(73) Act March 16, 1905, P. L., 42. Prior to the passage of this act it had been held that when executors differed as to how shares should be voted they could not be voted at all. See Tunis *v.* Hestonville, M. & F. R. R. Co., 149 Pa., 70 (1892); Lafferty's Estate, 154 Pa., 430 (1893).

220. Voting of Pledged Stock.

As between the pledgor and the pledgee of capital stock pledged to secure a specific loan, with a fixed period or periods of maturity, the right to vote shall be determined as follows: First, by the written agreement of the pledgor and pledgee. Second, in all other instances, the pledgor shall be held to be the owner and entitled to the right to vote.[74]

Prior to the passage of the above provision it was held that in the absence of any agreement between parties the right to vote followed the legal title, which was usually, by the transfer of the stock on the books of the corporation, in the pledgee.[75] The Act of May 7, 1889, P. L., 102, Sec. 2, which is superseded by the Act of May 26, 1893, supra, provided that a pledgor might vote the stock pledged, if he had reserved the right to do so, but made no provision for voting the same where there was no agreement. The Act of 1893 vests the right to vote pledged stock in the pledgor, where there is no agreement to the contrary, instead of in the pledgee, as was the rule under the decisions of the court before the passage of said act.

221. Judges of Elections[76]—Invalid Elections.

The law does not provide how judges of election shall be appointed nor what their number shall be, except in the case of street railway companies (Sec. 1502) and elections to pass upon increases and decreases of capital stock. The number of judges, therefore, and the method of their selection, except in the cases noted, is a matter for regulation by by-law. Where there is no by-law upon the subject, a resolution may be adopted naming the persons to serve as judges, or authorizing the president or chairman of the meeting to appoint a certain number of judges.

No person acting as judge or officer holding an election for any such corporation, shall enter on the duties of his office or appointment until he take and subscribe an oath or affirmation before a judge, alderman, justice of the peace, or other person qualified by law to administer oaths, that he will discharge the duties of his

(74) Act May 26, 1893, P. L., 141, Sec. 3.

(75) Com. *v.* Dalzell, 152 Pa., 217 (1893); Com. *v.* Patterson, 158 Pa., 476 (1893); Wilmerdine *v.* Welsh et al., 47 Leg. Int., 26 (1890).

(76) See also Secs. 941, 1374 and 1375.

office or appointment with fidelity, that he will not receive any vote but such as he verily believes to be legal; and if any such judge or officer shall, knowingly and wilfully, violate his oath or affirmation, he shall be subject to all the penalties imposed by law upon the officers of the general election of this Commonwealth violating their duties, and shall be proceeded against in like manner and with like effect; and if any election, as aforesaid, be held without the person holding the same having first taken an oath or affirmation, as aforesaid, or be invalid for any other reason, such election shall be set aside in the manner now provided by law, and a new election ordered by the Court of Common Pleas of the proper county, upon the petition of not less than five stockholders supported by proof satisfactory to said court.[77]

Sec. 8 of the Act of April 29, 1874, *supra,* provides in its last clause a method by which an invalid election may be set aside and a new election ordered, which is different from the trial of the title to office of an individual claiming to be an officer of a corporation. The proper proceeding in the latter case is by quo warranto, and not under the provisions of Sec. 8 of the Act of April 29, 1874.[78]

An action cannot be maintained against a corporation by one who, by their appointment, has acted as a judge of election to recover indemnity for the amount of damages and costs previously recovered against him by a corporator, for having fraudulently and maliciously refused his vote when offered. The record of the suit brought against the plaintiff by such corporator is conclusive that the rejection was fraudulent and malicious.[79]

Where there is no law to the contrary, a by-law authorizing the president of a corporation to appoint judges of election is valid.[80]

222. Supervision of Elections by Courts of Equity.

Courts of Common Pleas may appoint masters to supervise elections of directors when it is made to appear that a fair elec-

(77) Sec. 8, Act April 29, 1874, P. L., 78. This provision appears to have been taken from Section 4, Act of March 11, 1857, P. L., 79. See Sec. 879.

(78) Com. *v.* Straus, 32 Pa. Super. Ct., 389 (1907).

(79) Wecklery *v.* Lutheran Congregation, 3 Rawle, 172 (1831).

(80) Com. *v.* Woelper, 3 S. & R., 29 (1817).

tion cannot otherwise be held;[81] but they will refuse to do so unless good and sufficient reasons are shown for so doing, even where the companies make no objection.[82]

Since the adoption of the new equity rules, however, discontinuing the office of master in chancery, a court of common pleas has no power to appoint a master to conduct a corporate election, when there is no decree ordering such election, even with the consent of all parties.[83]

The power to control all corporations, conferred by the Act of June 13, 1836, P. L., 621, on courts of equity will be used to control corporate elections where it is shown in advance that by reason of fraud, violence or other unlawful means an honest election cannot be held, but it will not be used to set aside an election regularly held.[84]

Where a corporate election is held at the proper place and appointed time, and the meeting is regular, quiet and orderly, the only way to contest the validity of the election is by a writ of quo warranto, as provided by the Act of June 16, 1836, P. L., 621.[85]

A Court of Common Pleas in equity has jurisdiction to supervise and control a corporate election, and, in the exercise of their jurisdiction, upon a bill filed anterior to an election, at which it is alleged that difficulties may arise, it will direct the judge of election to return to the court the votes cast, together with a list of challenged votes which were received or ruled out.[86]

A disorder occurred at a corporate meeting, in which all parties participated. After the disorder had ceased, part of the stockholders withdrew to carry out a preconceived scheme to organize and run a meeting in their own interest. Their call to withdraw was not to all stockholders, but to members of their own faction. They organized another meeting, but, before voting sent an invitation to the other stockholders to come and vote. Held, that the acts of such meeting were illegal, and that the invitation to

(81) Tunis *v.* Hestonville, F. & M. R. Co., 149 Pa., 70 (1892), citing Gowen's Appeal, 10 W. N. C., 85; Titusville Oil Exchange's Ap., 2 Pa. Super. Ct., 508 (1896); Jenkins *v.* Baxter, 160 Pa., 199 (1894).

(82) Dick *v.* Lehigh Valley R. Co., 4 D. R., 56 (1895); Com. *v.* Phila. & R. R. Co., 3 D. R., 115 (1893).

(83) Yetter *v.* Delaware Valley R. R. Co., 206 Pa., 485 (1903).

(84) Jenkins et al. *v.* Baxter, 160 Pa., 199 (1894).

(85) Jenkins et al. *v.* Baxter, 160 Pa., 199 (1894).

(86) Raynor *v.* Beatty, 9 W. N. C., 201; 14 Phila., 80 (1880).

the other stockholders did not cure radical defects of organization. [87]

A decree appointing a master to conduct an election by stockholders and to report to the court is not final, and an appeal does not lie from it, but only from the final decree of the court disposing of the whole subject matter. In such a case it is immaterial that the court has found as a fact that the complainants who filed the bill for the appointment of a master were stockholders of the corporation, and had been forcibly excluded from a meeting previously held.[88]

When the full number of directors was not elected on the day fixed by the by-laws for the election thereof, and no time was named for an election to fill the vacancies, on a bill in equity, the court ordered another election.[89]

When the court finds that neither of two parties claiming a corporate office were elected thereto, it may order a new election[90] and may also fix the time and place of an election when the directors, whose duty it is to do so under the by-laws, have failed to do so.[91]

But when a company is in the hands of a receiver, a court will not grant leave to withdraw a call for an election accidentally made contrary to the provisions of the by-laws, and fix another time for the meeting, the matter having no relation to the objects for which the receivers were appointed.[92]

223. Voting on Illegally Issued Stock.

Where a *de facto* officer of a corporation procures an issue to himself of a greater number of shares of stock than he is entitled to—on an increase of capital stock—equity will restrain him from voting the stock until a proper equilibrium is restored among the shareholders. Where a person illegally acting as president and director of a corporation has stock of the company issued to him, for which he pays value, the corporation cannot have the stock cancelled if it has accepted the money for the stock and enjoyed

(87) Com. *v.* Patterson, 158 Pa., 476 (1893).
(88) Nat. Transit Co. *v.* U. S. Pipe Line Co., 180 Pa., 224 (1897).
(89) Forsyth *v.* Brown, 13 Pa. C. C., 576 (1893).
(90) Com. *v.* Cullen, 13 Pa., 132 (1850).
(91) Anderson *v.* Eltonhead, 20 Phila., 188 (1890); 26 W. N. C., 95.
(92) Taylor *v.* Phila. and Reading R. R. Co., 7 Fed. Rep., 381 (1881).

the benefits arising from the sale, but the officer cannot vote the stock to control elections.[93]

And so where a subscription to stock is made in order to permit of the increase of the capital stock to an amount equal to a proposed mortgage, but the subscription is verbal, not accepted nor paid, the stock so subscribed for cannot be voted.[94]

224. Voting of Stock in Oil and Mining Companies.

No stockholder shall be allowed to cast his vote for the election of any officer or officers of any oil or other mining company, incorporated by the laws of this Commonwealth, unless such stockholder shall produce his certificate of stock, with power of attorney, properly stamped, or such other satisfactory evidence that he, she or they are bona fidely the owners of such stock to be so voted, as the secretary and other officers of said company shall require.[95]

225. Minutes of Stockholders' Meetings.

The minutes of a corporation are not the exclusive evidence of what took place at a meeting of the stockholders. The action of the stockholders may be proved by parol evidence, where such proof is not in conflict with any recorded action, but merely to supply that which was omitted from the minutes.[96]

226. Stockholders May Vote on Questions in Which They are Interested.

The right of a stockholder in a corporation to vote upon the question of a contract between the corporation and himself cannot be denied, if the agreement is in good faith, and not fraudulent or destructive of the rights of the corporation, but stockholders may not vote their stock so as to authorize the issue to them of the company's notes for baseless claims.[97]

(93) Morris et al. *v.* Stevens et al,, 178 Pa., 563 (1897).

(94) Com. *v.* Patterson, 158 Pa., 476 (1893).

(95) Act April 15, 1867, P. L., 81.

(96) Harmony Bldg. Assn. *v.* Goldbeck et al., 40 Leg. Int., 172 (1884). The recorded resolutions adopted at a meeting of stockholders may not be varied by evidence of declarations made at such meeting. Miller *v.* Church, 4 Phila., 4 (1860).

(97) Weckerly *v.* Fell et al., 22 Pa. C. C., 209 (1899).

227. Combinations to Control Corporate Elections not Necessarily Illegal.

There is no fraud, *prima facie,* in a majority of stockholders uniting to vote together to control a corporate election.[98]

228. Shareholders in Arrears May Not Vote.

. . . . No stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any installments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting.[99]

229. Quo Warranto the Method of Testing the Validity of Corporate Elections.

Quo warranto is the method by which to test the validity of corporate elections. Injunctions to restrain officers from acting, upon the ground that they have not been properly elected will not be granted,[100] and a bill in equity to compel the surrender of the property of a corporation cannot be sustained where it appears that the real question in controversy is the validity of the election of the defendants as officers of the corporation, quo warranto being the appropriate remedy.[1]

If an election for managers of a corporation be not disputed during their term of office, by quo warranto, and they are permitted to act throughout their terms, as managers *de facto,* the legality of the next election cannot be questioned for any vice or irregularity of the preceding officers.[2]

But stockholders are not disqualified from inquiring into the administration of officers who served before they became stockholders.[3]

230. Provisions in By-Laws of Corporations of the First Class As to Voting.

See Chapter VI, Sec. 97.

(98) Hartley et al. *v.* Welsh et al., 23 Pa. C. C., 78 (1899).

(99) Act of May 9, 1889, P. L., 180.

(100) Paynter *v.* Clegg, 9 Phila., 480 (1873); Jenkins *v.* Baxter, 160 Pa., 199 (1894); United Fire Assn. *v.* Benseman, 4 W. N. C., 1 (1877). See however, Brown *v.* Elec. etc. Co., 39 Pitts. L. J., 343 (1892); Forsyth *v.* Brown, 13 Pa. C. C., 576 (1893); O'Shea *v.* Flannery, 26 Pa. C C., 89 (1901).

(1) Bedford Springs Co. *v.* McMeen, 161 Pa., 639 (1894).

(2) Com. *v.* Smith, 45 Pa., 59 (1863).

(3) Miller *v.* McCutcheon, 2 Pars., 205 (1851).

231. Changes of Offices and Places of Meeting.

Whenever, by any general or special law of this Commonwealth, it has been provided that the principal office of any corporation shall be kept or maintained in any particular place, it shall be lawful for the holders of one-fourth of the stock of such corporation to file in the office thereof, among the records of said corporation, a declaration and certificate that a change in the location of said principal office is in their opinion necessary for the interest of said corporation, and thereupon it shall be the duty of the president and secretary of said company to give notice by publication in a newspaper of the county wherein the principal office of the company is located during two weeks, that an election will be held not more than four weeks or less than three weeks from the date of the filing of said declaration, at the office of said corporation, for the purpose of determining the future location of the principal office.

Sec. 2. At such election each stockholder shall be entitled to one vote for every share of stock held by him or her; the voting shall be by ballot, each ballot containing the name of the shareholder and number of shares of his stock, and the location voted for by him or her; and if upon counting the vote it shall appear that a majority of the shares of stock have been voted in favor of any new location, a certificate of the result, under the seal of the corporation, signed by the president and secretary, shall be filed in the office of the Secretary of the Commonwealth, and the principal office of the company shall be removed to said location as soon as practicable thereafter: *Provided,* That this act shall not authorize any corporation to remove its office beyond the limits of the county where the principal office of said company is located at the time of holding the election for the purpose of changing said location.[4]

It shall be lawful for any corporation of this State, now existing or hereafter created, to change the location of its principal office, the place of its annual and other meetings of stockholders, or the time for holding such annual meetings, or either, or all, by resolution of its board of directors, adopted by a two-thirds vote thereof, approved at any annual meeting or special meeting duly called of the stockholders, by a two-thirds vote thereof. Upon such approval of the stockholders, it shall be

(4) Act March 18, 1879, P. L., 7.

the duty of the president of such corporation to file in both the offices of the Secretary of the Commonwealth and the Auditor General of this Commonwealth a report, under the seal of the company, specifying the change or changes so made. Nothing in this act, however, shall authorize the location of the principal office or the holding of the annual or other meetings of stockholders outside of the limits of this Commonwealth.[5]

(5) Act June 8, 1893, P. L., 355.

CHAPTER XIII.

PROMOTERS.

232. Ratification of Acts of Promoters.
233. Agreements by Promoters to Assume Subscriptions for Stock made at their Suggestion.
234. Sales of Property to a Corporation by Promoters.

232. Ratification of Acts of Promoters.

Where a number of persons, not incorporated, but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he shall be compensated, if such acts were necessary to the organization and its objects and are accepted by the corporation, and the benefits are enjoyed, they must be taken *cum onere* and be compensated for.[1] But it seems, to bind a corporation, a majority of the projectors must have authorized and agreed to pay for such acts,[2] and a promise by but one promoter, not subsequently ratified by the corporation, will not support an action for services rendered.[3] The general rule of law, however, appears to be that a corporation accepting the benefits arising from a contract made on its behalf by a promoter must accept the burden, and in such case it would seem to be immaterial whether the contract was authorized by a majority of the projectors or whether there was a subsequent formal ratification thereof, the acceptance of the benefits constituting an implied acceptance.[4]

But the fact that, after incorporation, the claim of a promoter was brought to the attention of the board of directors, at a meet-

(1) Bell's Gap. R. R. Co. *v.* Christy, 79 Pa., 54 (1875); 1 W. N. C., 618; Dengler *v.* Helms, 4 Walker, 476 (1883); Titus *v.* Catawissa R. R. Co., 5 Phila., 172 (1863).

(2) Bell's Gap R. R. Co. *v.* Christy, 79 Pa., 54 (1875); The Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 7 D. R., 430 (1897).

(3) Tift *v.* Quaker City Nat. Bank, 141 Pa., 550 (1891).

(4) Cook on Corporations, Sec. 707, p. 1462, Note; Merchants' Nat. Bank *v.* Eckels, 191 Pa., 372 (1899).

ing thereof, as a liability, and was not objected to, is not sufficient evidence of a ratification of the promoter's employment.[5]

A person contracting with a promoter for work to be done for a proposed corporation may elect whether he will proceed against such promoter for any cause of action arising under the contract, or against the corporation after it is formed, unless he expressly agreed to look to the corporation, only, for compensation. Thus, where a market association was formed with a view to incorporation and the directors thereof, prior to incorporation and without being authorized by the members of the association, contracted with a party for glazing and painting the market house, it was held that the subsequent incorporation did not substitute the responsibility of the corporation for contracts previously made with the association, and that the directors might be held personally liable on such contract, and, further, that had the contract been authorized by the members of the association, they would have been individually liable thereon.[6] But where a lease was made to the promoter of the corporation, which he was to assign to the same after incorporation, which fact was known to the agent of the lessor, and he did so assign it and the lessor collected the rent from the corporation for a number of years, never having made any claim for the payment of the rent by the promoter during the latter's lifetime, exceptions to the audit of the promoter's estate wherein a claim for rent was allowed were sustained.[7]

Where a promoter takes a lease in his own name for the use of the company which he proposes to form, and the corporation after organization ratifies his act before any withdrawal or disavowal by him, the lease becomes the property of the corporation, whether the same be to its advantage or not.[8]

Where the claim of a promoter for moneys alleged to have been expended by him for the use and benefit of a corporation has been acknowledged by its board of directors and ordered paid, the defendant may not avail itself of a breach of an agreement between the plaintiff and the president of the corporation, in the individual capacity of the latter as one of its promoters, in consid-

(5) Tift *v.* Quaker City Nat. Bank, 141 Pa., 550 (1891).

(6) Dengler *v.* Helms, 4 Walker, 476 (1883).

(7) Heckman's Estate, 172 Pa., 185 (1896). Affirming 15 Pa. C. C., 264.

(8) Central Trust Co. *v.* Lappe, 216 Pa., 549 (1907).

eration of which plaintiff undertook to finance the company, in consideration of receiving stock.

Where the statement of claim in such action avers that part of such moneys was expended for the benefit of defendant "with its consent and acceptance" and that a detailed statement was submitted to it, which was approved and ordered paid, an affidavit of defense failing to deny that the money was expended for defendant's benefit, that it had acknowledged the indebtedness as its own and ordered the same to be paid, is insufficient as to that part of the claim.[9]

233. Agreements by Promoters to Assume Subscriptions for Stock Made at Their Suggestion.

An agreement of a promoter to take the stock to be subscribed for by another person, at a future time, if the latter require, is based upon a sufficient consideration;[10] but where such an agreement existed, and the stockholder claimed that he had rescinded his contract of subscription and required the purchase of the stock by the promoter, under the terms of said agreement, it was held that evidence introduced by the defendant showing that the stockholder had given a proxy to vote his stock, had attended and taken part in a meeting of the stockholders, etc., was *prima facie* evidence of acts of ownership by the plaintiff inconsistent with a recission of the contract.[11]

Where a promoter subscribed for stock, paid for a part thereof in full and handed the certificates for the remainder to the treasurer of the corporation who transferred the same to the contractor erecting the works of the company in payment for such works, it was held that the subscriber was not liable upon his subscription to the amount so transferred.[12]

234. Sales of Property to a Corporation by Promoters.[13]

1. Where the promoter acquired the property or secured an option thereon without having in mind, at that time, the sale of it to a corporation.

(9) Hearther *v.* Southern Power & Milling Co., 16 D. R., 198 (1907).
(10) McClymonds *v.* Stewart, 2 Super. Ct., 310 (1896).
(11) Jessup *v.* Ivory, 158 Pa., 71 (1893).
(12) Riverton Water Co. *v.* Hummel, 175 Pa., 575 (1896).
(13) See Secs. 192, 195, 240.

In such a case [14] Justice Sharswood used the following language:

"Any person who owns property of any kind may form an association with others and sell it at any price, without regard to the original cost, if there be no fraudulent misrepresentation, and if the property have not been bought with a view to such sale. The vendors are not bound to disclose the profit which they may realize. The vendors would not be agents or trustees in their original purchase, and there would be no confidential relation which would affect them with a trust. . . . [But] when persons form or begin to form an association they stand on a confidential relation with each other, and to all others who may become members, and none of them can purchase property for the purposes of the association and sell it for an advance without a full disclosure of all the facts. Such persons must account to the company for the profits."

This reasoning is criticised in a note to page 55 of Taylor on Private Corporations, 4th Edition, very justly. If the promoter occupies a confidential relation with his associates it would seem that he should not be allowed to sell property to them at any advance on the price thereof which he can persuade them to pay, whether he bought the property with a view to selling it to them, or not.

Later decisions have not adopted this proposition to its full extent. In Rice's Appeal [15] it was held that where a man organized a corporation for the sole purpose of disposing of previously acquired lands thereto and controls such corporation, he is, in dealing with it, in effect dealing with himself, and may not dispose of his property at an exorbitant price.

The law probably is, therefore, that a promoter who has bought property or secured an option thereon without having in view the sale of the same to a corporation, may sell it to a corporation subsequently formed, of which he is a promoter, for any price which may be agreed upon, but the courts will look into the circumstances of each case, and if they find that the corporation was formed to purchase such property from the promoter, that he controlled the corporation and made exorbitant profits by the transaction, they will require him to account for such profits to the corporation.[16]

(14) Densmore Oil Co. *v.* Densmore et al., 64 Pa., 43 (1870).

(15) Rice's Appeal, 79 Pa., 168, 205 (1875).

(16) Rice's Appeal, 79 Pa., 168, 205 (1875); McElhenny's Appeal, 61 Pa., 188 (1869); Pennell's Appeal, 10 W. N. C., 297 (1881). See Warren-Ehret Co. to use *v.* Franklinville Ice Mfg. Co., 198 Pa., 413 (1901).

2. Where a promoter buys property or secures an option thereon with a view to selling the same to a corporation.

In this case the promoter will be presumed to occupy a position similar to that of an agent acting for an undisclosed principal, and will be estopped from denying that he acted as the agent of the corporation in making the purchase, and therefore be liable thereto for any profit which he may make on such sale, unless he inform the corporators what amount he paid or agreed to pay for the property, or, possibly, inform them simply that he is making a profit by the transaction, in which case the presumption that he acted as the agent of the corporation in purchasing the property will be overcome, and he may retain any profit that he may make by the sale.[17]

"If he, the (defendant), had disclosed the exact sum for which the land could be bought, and which he actually paid for it, and had refused to sell to his associates for less than double the amount which he paid, and the plaintiff had subscribed and agreed to pay $1,000 for a share with full knowledge of all the facts, the transaction would have been unimpeachable, and the defendant might have pocketed the profits without any liability to account therefor. But he made no such disclosure." See also Densmore Oil Co. *v.* Densmore et al., 64 Pa. 43 (1870) where the other corporators understood that Densmore was making a profit.

3. Where a promoter sells property which he has purchased or secured an option upon, with a view to such sale, to a corporation, without stating to the corporators the amount which he paid for the property, or agreed to pay, or informing them that he is making a profit by the sale, he is liable for any profit which he may make by the transaction.[18] It would seem that the liability of the promoter in such case is to the corporation, and not to stockholders.[19]

Where a corporation was organized under the Manufacturing Companies' Act of 1863, which did not permit of the issue of stock in payment of property, it was held that the unanimous consent of all the corporators to the issue of stock in payment for property did not validate the transaction, inasmuch as their consent could not affect those whom they contemplated bringing in as stock-

(17) Short *v.* Stevenson, 63 Pa., 95 (1869).

(18) Simons *v.* Vulcan Oil & Mining Company, 61 Pa., 202 (1869); 16 Pitts. L. J., 113; McElhenny's Appeal, 61 Pa., 188 (1869); Densmore Oil Co. *v.* Densmore et al., 64 Pa., 43 (1870).

(19) Caldwell *v.* Boyd, 57 Pa., 321 (1868).

holders under the authority of law upon which they founded themselves.[20]

Persons who proceed against promoters for concealed profits should act with reasonable diligence. A bill was dismissed where four and one-half years had elapsed between the transaction complained of and the filing of the bill.[21]

A stockholder's bill against a corporation and another stockholder to compel the latter to surrender stock and cash which he received for property alleged to have been fraudulently sold to the corporation is properly dismissed when it appears that the defendant stockholder, although a promoter of the company, sold the property to the corporation more than a year after its organization, had used no fraud or solicitation to induce the directors to make the purchase, which seemed advantageous to the company, and that plaintiff knew of the proposed purchase when he bought his stock.[22]

(20) Bailey *v.* Pittsburg & Connellsville Gas C. & C. Co., 69 Pa., 334 (1871).

(21) Kuhn's Appeal. Evan's Appeal, 81 Pa., 278 (1876).

(22) Russell *v.* Rock Run Fuel Gas Co., 184 Pa., 102 (1898).

CHAPTER XIV.

CAPITAL STOCK.

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272. Stock Bonus.

235. Acts Relative to Capital Stock.

The capital stock of every such corporation that has or requires capital stock, shall consist of not more than one million dollars, except companies incorporated for the purpose of supplying the public with water, whose capital stock shall not exceed two million dollars,[1] and shall be divided into shares of not more than one hundred dollars each; and all subscriptions to the capital stock shall be paid in such instalments and at such times as the directors may require, and if default be made in any payment the person or persons in default shall be liable to pay, in addition to the amount so called for and unpaid, at the rate of one-half of one per centum per month for the delay of such payment, and the directors may cause suit to be brought for the recovery of the amount due, together with the penalty of one-half of one per centum per month, as aforesaid, or the directors may cause the stock to be sold in the manner provided in clause two of section thirty-nine of this act; and no stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any instalments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting. The shares of the capital stock of every such company may be transferred on the books of the company in person or by attorney, subject to such regulations as the by-laws may prescribe; but the provisions of this section shall not apply to corporations in which by this act different and other rules and provisions are enacted for their regulation and government.[2]

The stock of every corporation created under the provisions of this statute shall be deemed personal property; and no shares shall be transferable until all previous calls thereon shall have been fully paid in, or shall have been declared forfeited for the non-payment of calls thereon. No note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as a payment of any part of the capital stock. It shall and may be lawful for any corporation, organized under the provisions of this act either for the purpose of carrying on any manu-

(1) The amount of capital stock which a corporation formed under the Act of April 29, 1874, may have is now unlimited.

(2) Sec. 11, Act April 29, 1874, P. L., 79, as amended by Act of May 9, 1889, P. L., 181.

facturing business, or for the supply of water, or for the manufacture or supplying of light, to subscribe for, take, purchase, hold, and dispose of the bonds or stock in any company of the same character, incorporated under the provisions of this act or its supplements, or guarantee the payment of said bonds and the interest thereon, or either principal or interest, or to enter into contracts for the use or lease of the corporate property, real, personal or mixed, of such company, upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such property in accordance with such contract or lease.[3]

All contracts heretofore made and entered into, since the passage of the above recited act [Act of June 26, 1895, P. L., 369], for the use or lease of their corporate property, real, personal or mixed, by companies incorporated under the corporation act of one thousand eight hundred and seventy-four, for the purpose of carrying on any manufacturing business, or for the supply of water, or for the manufacture or supplying of light, and, generally, all things lawfully done in pursuance of said recited act, are hereby validated, with like effect as if the said recited act were in the words of this supplement: *Provided,* That nothing herein contained shall apply to or affect pending litigation.[3*]

236. Definition.

"The words stock, and capital stock, may be defined as meaning the fund or property belonging to a firm or corporation and used to carry on its business. This is contributed by those who embark in the business. The articles of copartnership, or the charter of the corporation, fix the maximum amount of stock that may be issued, and this may properly be spoken of as the proposed or authorized capital of the company. When an organization is effected, subscriptions are made to the stock by which the subscribers agree to take and pay for certain sums or

(3) Sec. 1, Act of March 24, 1905, P. L., 56, which amended the Act of June 26, 1895, P. L., 369, which amended the Act of May 25, 1887, P. L., 273, which was an amendment to Sec. 12, Act of April 29, 1874, P. L., 79.

(3*) Sec. 2, Act March 24, 1905, P. L., 56. See Moore *v.* Chartiers Valley Water Co., 216 Pa., 457 (1907), construing the Act of June 26, 1895, P. L., 369.

shares each. The total amount of stock thus taken constitutes the subscribed capital of the company.[4]

The shares of stock of a corporation are a different thing from the capital stock. The shares represent the interest which the holders have in the corporation,[5] while, as above stated, the capital stock represents the paid-in capital. In revenue statutes, however, the term capital stock is used as representative not only of the paid-in capital, but also of the entire property, assets, earning capacity and franchises of a company.[6]

"There is a well-understood distinction, universally recognized, between 'the capital or property' of incorporated companies and 'their capital stock.' The term 'capital' applied to corporations is often used interchangeably with 'capital stock' and both are frequently used to express the same thing,—the property and assets of the corporation—but this is improper. The capital stock of a corporation is the amount subscribed and paid in by the shareholders, or secured to be paid in, and upon which it is to conduct its operations; and the amount of the capital stock remains the same, notwithstanding the gains or losses of the corporation. The term 'capital,' however, properly means not the capital stock in this sense, but the actual property or estate of the corporation, whether in money or property. As was said in a New York case, 'It is the aggregate of the sums subscribed and paid in, or secured to be paid in by the shareholders, with the additions of all gains or profits realized in the use and investment of these sums, or if losses have been incurred, then it is the residue after deducting such losses.' It follows, that a corporation's capital may be many times greater than its capital stock, and it is this which makes the shares of stock of a corporation worth more on the market than their par value." Clark and Marshall on Corporations, 1140.

"There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms. The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed

(4) Com. *v.* Lehigh Ave. Ry. Co., 129 Pa., 405-15 (1889). See City of Phila. *v.* Ridge Ave. Pass. Ry. Co., 102 Pa., 190 (1883).

(5) Lycoming Co. *v.* Gamble, 47 Pa., 106 (1864); Wilkes-Barre D. & S. Bank *v.* Wilkes-Barre, 148 Pa., 601 (1892).

(6) Com. *v.* Standard Oil Co., 101 Pa., 148 (1882).

although the actual property of the corporation varies in value, and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the law governing it. It follows, therefore, that a limit imposed upon the capital stock of a corporation, does not restrict the amount of property which it may own. Upon the distinction between the capital of a corporation, which is its property, and the capital stock which represents the interests of the stockholders in the corporation, and is their property, the power of the States to subject the shares of national banking associations to taxation is based. 2 Beach on Corporations, Sec. 466." [6*]

Where the charter of a street railway company permitted it to borrow money to an amount not exceeding one-half the par value of the capital stock, it was held that by par value was meant the aggregate amount of paid-in capital, and not the nominal value of the authorized capital stock.[7]

237. Shares of Stock.

"A share of stock is an incorporeal, intangible thing. It is a right to certain proportions of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation, with the right to receive, in the meantime such profits as may be made and declared in the shape of dividends" [8] and to vote in the choice of the officers of the corporation and in the management of its concerns.[9]

The shares of the capital stock of a corporation are essentially distinct and different from the corporate property, and the owner of all the stock of a corporation does not own the corporate property or become entitled to manage or control it.[9*]

(6*) Person & Riegel Co. *v.* Lipps, 219 Pa., 99 (1907).

(7) Com. *v.* Lehigh Avenue Ry. Co., 129 Pa., 405 (1889).

(8) Neiler & Warren *v.* Kelly, 69 Pa., 403 (1871); Bidwell *v.* Pgh., Oakland & E. Liberty Pass. Ry. Co., 114 Pa. 535 (1886).

(9) Fisher *v.* Essex Bank, 5 Gray (Mass.) 373 (1855).

(9*) Monongahela Bridge Co. *v.* Pitts. & B. Traction Co., 196 Pa., 25 (1900); Rhawn *v.* Edge Hill Furnace Co., 201 Pa., 637 (1902).

Shares of stock are personal property,[10] and choses in action.[11]

237a. Par Value of Shares of Stock.

Under the provisions of Sec. 11, Act of April 29, 1874, P. L., 79, as amended by Act of May 9, 1889, P. L., 181—See Sec. 235—the par value of the shares of stock of corporations formed under the Act of April 29, 1874, and its supplements, except as hereinafter noted, may be any sum not to exceed one hundred dollars ($100) each.

The par value of the shares of stock of banks of deposit may be any sum not less than fifty dollars ($50.00) each. See Sec. 935.

The par value of the shares of stock of building and loan associations may be any sum not exceeding five hundred dollars ($500) each. See Sec. 1126.

The par value of the shares of stock of the various kinds of insurance companies will be found on reference to the chapter relating to insurance companies.

The par value of the shares of stock of natural gas companies may be such amount as each company may determine. See Sec. 1368.

The par value of the shares of stock of traction companies formed under the Act of March 22, 1887, may be such sum as each of said companies may determine. See Sec. 1481.

The par value of the shares of stock of street railway companies formed under the provisions of the Act of May 14, 1889, must be fifty dollars ($50.00). See Sec. 1500.

The par value of the shares of stock of elevated or underground railways does not appear to be fixed by the Act of June 7, 1901, P. L., 523, providing for the incorporation of such companies. See Secs. 1529 to 1538.

238. Certificates of Stock.[11]

239. Capital Stock a Trust Fund.[12]

Pennsylvania decisions have followed the doctrine laid down

(10) Sec. 12, Act April 29, 1874, P. L., 79, and amendment of May 25, 1887, P. L., 273. Bank shares: Sec. 5, Act May 13, 1876, P. L.,161.

(10*) Slaymaker *v.* Bank of Gettysburg, 10 Pa., 373 (1849); People's Bank *v.* Kurtz, 15 Phila., 135 (1882).

(11) See Secs. 322, 323.

(12) See Chapter 24, Insolvent Corporations.

by Mr. Justice Story in Wood *v.* Dummer, 3 Mason, 308 (1824) that the capital stock of a corporation is a trust fund for the benefit of creditors and should be administered as such by courts of equity.[13] So long as the corporation is solvent, however, it holds its property absolutely free from the touch of creditors who have not acquired liens.[14]

240. How Stock May be Issued.

Stock may be issued for cash or for property or by means of a stock dividend. Unless there is an agreement to the contrary, subscriptions for stock are deemed to be cash subscriptions.

Stock issued for property:——[15]

Every corporation created under the provisions of this act or ac-

(13) Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869); Lane's Ap., 105 Pa., 49 (1884); Shamokin Valley & Pottsville R. R. Co. *v.* Malone, 85 Pa., 25 (1877); Stang's Appeal, 10 W. N. C., 409 (1881). The Supreme Court of the U. S. has, however, discountenanced this doctrine in the case of Hollins *v.* Brierfield etc. Co., 150 U. S., 371 (1893) in which case the Court says: "Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. It is rather a trust in the administration of assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Cook on Corpns., Sec. 9.

(14) Coit *v.* North Carolina Gold Amal. Co., 15 Phila., 496 (1882); Hollins *v.* Brierfield etc. Co., 150 U. S. 371 (1893).

(15) The Act of April 13, 1838, Sec. 9, P. L., 379, supplementary to the Act of June 13, 1836, P. L., 802, authorizing the incorporation of iron manufacturing companies, provides that where real or personal estate is subscribed for stock the corporators shall apply to the Court of Common Pleas of the proper county to appoint three disinterested persons to appraise said property and make a return thereof to the court, where, if confirmed by the court it shall be entered of record, and a certified copy be presented to the Governor, who shall consider the same in ascertaining the amount to have been subscribed *bona fide* as required by the said Act of 1836.

Similar provisions were contained in a number of special acts: Acts of April 5, 1826, P. L., 198; April 9, 1828, Sec. 4 (255); April 20, 1829, P. L., 222; April 12, 1866, Sec. 2, P. L., 78. A special act incorporating the Duncannon Iron Co., of March 18, 1857, P. L., 1858, 531, provides that subscriptions may be paid in property appropriate to the business contemplated "at a *bona fide* cash valuation to be agreed upon by a majority in interest of the subscribers and stockholders, and in case they shall desire it the stockholders shall be at liberty to ask the assistance of the regularly appointed assessors in the township or townships where said property is situated." These safeguards had disappeared from special acts by the year 1872. See Act of April 4, 1872, P. L., 1873, 1068, in which there is no restriction on the issuing of stock for property. See Chapter "Promoters."

cepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property, as is necessary for the purposes of its organization(s) and business, and issue stock to the amount of the value thereof, in payment thereof, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further calls or assessments; and in the charter and the certificates and statements to be made by the subscribers and officers of the corporation; such stock shall not be stated or certified as having been issued for cash paid into the company, but shall be stated or certified in this respect according to the fact; and the executors or administrators of any deceased tenant in common of lands, mines and mineral rights so proposed to be taken may, and they are hereby authorized to convey the individual estate and interest of such decedent therein to such company, receiving therefor so much stock in such company as the said decedent would have been entitled to receive in his lifetime, to be held in the same manner as the lands: *Provided,* That no directions or limitations contained in any last will and testament of such decedent shall be in any manner interfered with; *And provided,* That before making such conveyance, such executors or administrators shall give sufficient security, to be approved by the Orphans' Court having jurisdiction of their accounts, for the faithful application of the stock received therefor; no such corporation shall issue either bonds or stock except for money, labor done or money or property actually received, and all fictitious increase of stock or indebtedness in any form shall be void; every such corporation may provide for the issue of deferred stock in payment for such real or personal estate or mineral rights, and if so provided, it shall be expressly stated in the charter filed, or in a certificate to be made and recorded, or in the acceptance of this statute, to be filed by any corporation accepting its provisions, with the amount of such deferred stock, and the consideration of the same, and the terms on which the same shall be issued; and the said stock may be made to await payments of dividends thereon until out of the net earnings at least five per centum has been declared and paid upon the other full paid stock of the corporation.[16]

The act provides that a corporation may take for stock only

(16) Sec. 17, Act April 29, 1874, P. L., 81, as amended by Sec. 4, Act April 17, 1876, P. L., 32.

such property "as is necessary for the purposes of its organization." [17] In New York, where there is no such statutory restriction, it has been held *ultra vires* a corporation to take in payment of stock property not appropriate to the prosecution of the enterprise for which the company was formed.[18]

Where stock is to be issued for property on the incorporation of a company, the certificate of incorporation must set forth the number of shares issued for such property, the names of the persons to whom such shares are issued, respectively, a description of the property taken for the stock and a statement that such property is necessary for the purposes of the organization and business of the corporation.[19]

It appears that stock may be issued by a company about to be incorporated for services to be performed in the future by the subscriber.[20] But it would seem that in such case the certificate should recite the fact, and not state that the subscription was for cash, as in the case cited.

By the "certificates" referred to in the act is undoubtedly meant the certificates of incorporation and of increases of capital stock required to be filed with the Secretary of the Commonwealth, and not stock certificates.

Inasmuch as ten per centum of the authorized capital stock must be paid before incorporation, it follows that but ninety per centum of the capital stock of a corporation may be taken in payment for property at the time of incorporation.[21]

Where property is taken in payment for stock at a valuation made in good faith at the time of the transaction, such valuation is binding on the creditors of the corporation,[22] and upon subsequent stockholders.[23] The insolvency of the corporation will not

(17) Bonds of Corporations, 2 Chest. Co., 183 (1877); Rept. Atty. Gen., 1895-96, 331; Reorganization of Corps., etc. Rept. Atty. Gen., 1895-96, 338. See Phila. & W. Chester R. Co. *v.* Hickman, 28 Pa., 318 (1857).

(18) Powell *v.* Murray, 3 Ap. Div. (N. Y.) 274; 157 N. Y., 717.

(19) See Appendix for form.

(20) Shannon *v.* Stevenson, 173 Pa., 419 (1896).

(21) Hempfield Coal Co., 2 Chest. Co., 181 (1884); Rep. Atty. Gen., 1895-96, 396.

(22) Coit *v.* N. Carolina Gold Amal. Co., 15 Phila., 496 (1882); Same Parties, 119 U. S., 343 (1886); 14 Fed. Rep., 12 (1882).

(23) Penna. Tack Works *v.* Sowers, 2 Walker, 416, (1884).

affect the validity of the valuation,[24] nor does the fact that operations subsequent to the issue of stock for property show that the property was of small value, throw on the original members the burden of showing that the sale to the corporators was made in good faith on a reasonable belief of the value of the property.[25] The presumption is that the property was properly valued.[26]

Where the purpose is to make a *bona fide* transfer of property in payment of stock the courts will look to the true character of the transaction, determining the rights of parties in accordance with the facts, without regard to the devices by which the transfer is effected. Thus, where the members of an unincorporated association formed a corporation with a capital stock of $500,000, transferring to the corporation the property of the association in payment of said amount, with the understanding that the members of the association should receive $175,000 of stock, and that the balance should be sold to furnish working capital, it was held that the device resorted to in making the transfer, whereby $500,000 was apparently raised on a note of the members of the association, and placed in bank to the credit of the corporation in payment for the stock, and immediately checked out to the association in payment for its property, did not affect the rights of the stockholders to have their stock considered as full paid.[27]

Where a person at the organization of a corporation takes preferred stock for property contributed, knowing that there has been an issue of stock and bonds out of all proportion to the value of the company's property, and takes no action for six years and not until it has been ascertained that the company is unable to earn dividends upon the preferred stock, he will be barred by his laches from maintaining a bill in equity to have the bonds and stock in excess of the actual value of the corporate property cancelled.[28]

In an action by a receiver for an unpaid subscription to stock the defendant may prove that the company gave him full paid stock as an inducement to give up a position and accept one with the company of which the plaintiff is receiver.[29]

(24) Penna. Tack Works *v.* Sowers, 2 Walker, 416, (1884).
(25) American Tube & Iron Co. *v.* Baden Gas Co., 165 Pa., 489 (1895).
(26) Carr *v.* Le Fevre, 27 Pa., 413 (1856).
(27) Amer. Tube & Iron Co. *v.* Baden Gas Co., 165 Pa., 489 (1895).
(28) Jutte *v.* Hutchinson, 189 Pa., 218 (1899).
(29) Shannon *v.* Stevenson, 37 W. N. C., 537 (1896).

241. Stock Issued by Means of Stock Dividends.[30]

242. Increase of Capital Stock and Indebtedness—Constitutional Provision.

No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice given in pursuance of law.[31]

243. Increase May be Made to Any Necessary Amount.

Any corporation created by special or general law shall, notwithstanding any limitation upon the amount of its capital stock, by such special or general act, have authority, with the consent of the persons holding the larger amount in value of its stock, to increase its capital stock to such an amount, in the aggregate, as it shall deem necessary to accomplish and carry on and enlarge the objects and purposes of its incorporation, such increase may be made at once or from time to time, as the stockholders aforesaid shall determine: *Provided,* That this section shall not apply to corporations organized for the purpose of carrying on the business of brewing or distilling of malt or other liquors.[32]

(30) See Chapter 18, Sec. 389.

(31) Art. 16, Sec. 7, Constitution of Pennsylvania. The Act of May 7, 1887, P. L., 94, to enforce against railroad companies the provisions of Sec. 7, Art. 16, applies to street railway companies and traction companies as well as to railroad companies. See chapter on Street Railway Companies.

(32) Sec. 2, Act May 3, 1899, P. L., 190. See also Sec. 1 of the following Act of February 9, 1901, P. L., 3.

The Act of May 9, 1889, P. L., 180, amending Sec. 11 of the Act of April 29, 1874, permits the incorporation of companies with a capital stock of $1,000,000, except water companies formed for supplying the public with water which may have $2,000,000. The Act of May 25, 1887, P. L., 269, had provided that water companies in cities of the first and second classes might increase their capital stock to $20,000,000. The Act of April 17, 1889, P. L., 37, provided that ship-building corporations might increase to $5,000,000. By Act of June 8, 1891, P. L., 223, any corporation was permitted to increase its capital stock to $10,000,000, and by Act of June 10, 1893 (417) to $30,000,000. The Act of May 3, 1899, supra, permits of unlimited increases. See Sec. 355.

244. Increase of Capital Stock and Indebtedness of Corporations Formed Under the Act of April 29, 1874, and Its Supplements.

The capital stock or indebtedness of any corporation to be created under the provisions of this statute, or accepting its provisions, may be increased, from time to time, by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such company, to such amount as such corporation is by this act authorized to increase its capital stock or indebtedness, but such increase shall only be made for money, labor done, or money or property actually received.[33]

Any such corporation desirous of increasing its capital stock or indebtedness as provided by this act, shall, by a resolution of its board of directors, call a meeting of its stockholders therefor, which meeting shall be held at its chief office or place of business in this Commonwealth; and notice of the time, place and object of said meeting, shall be published once a week for sixty days prior to such meeting, in at least one newspaper published in the county, city or borough wherein such office or place of business is situate.[34]

At the meeting called, pursuant to the nineteenth section of this act, an election of the stockholders of such corporation shall be taken for or against such increase, which shall be conducted by three judges, stockholders of said corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent, the judge or judges present shall appoint a judge or judges, who shall act in the place of the judge or judges absent, and who shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same, well and truly, and according to law, to conduct such election to the best of their ability; and the said judges shall decide upon the qualification of voters, and when the election is closed count the number of shares voted for and against such increase, and declare whether the persons or bodies corporate holding the larger amount of the stock of such corporation have consented to such increase, or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such increase, and the number

(33) Sec. 18, Act April 29, 1874, P. L., 81.
(34) Sec. 19, Act April 29, 1874, P. L., 82.

that voted against such increase, and subscribe and deliver the same to one of the chief officers of said company.[35]

Each ballot shall have endorsed thereon the number of shares thereby represented, and be signed by the holder thereof, or by the person holding a proxy therefor; but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting, nor shall any proxy be received, or entitle the holder to vote, unless the same shall bear date and have been executed within three months next preceding such election or meeting; and it shall be the duty of such corporation to furnish the judges at said meeting with a statement of the amount of its capital stock, with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation, with an affidavit thereto annexed, that the same is true and correct to the best of his knowledge and belief.[36]

It shall be the duty of such corporation, if consent is given to such increase, to file in the office of the Secretary of the Commonwealth, within thirty days after such election or meeting, one of the copies of the return of such election provided for by the twentieth section of this act, with a copy of the resolution and notice calling same thereto annexed; and upon the increase of the capital stock or indebtedness of such corporation made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase and terms of the same, that is to say, the terms on which additional stock is issued; and in case of neglect or omission so to do, the corporation shall be subject to a penalty of five thousand dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer, as accounts for taxes due the Commonwealth are settled and collected; and the Secretary of the Commonwealth shall cause said returns to be recorded in a book to be kept for that purpose, and furnish a certified copy of the same to the Auditor General, and the corporation shall have the right to recover the same from the officer neglecting or omitting to file the return as aforesaid.[37]

(35) Sec. 20, Act April 29, 1874, P. L., 82.
(36) Sec. 21, Act April 29, 1874, P. L., 82.
(37) Sec. 22, Act April 29, 1874, P. L., 83.

245. Increase of Capital Stock and Indebtedness of "Any Corporation."

The capital stock or indebtedness of any corporation may be increased from time to time, by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such company, to such amount as such corporation is by law authorized to increase its capital stock or indebtedness: *Provided,* That no corporation shall increase the amount of its indebtedness beyond the amount of its capital stock subscribed, until the amount of its capital stock subscribed shall be fully paid in.[38]

Any corporation desirous of increasing its capital stock or indebtedness, as provided by this act, shall, by a resolution of its board of directors, call a meeting of its stockholders therefor; which meeting shall be held at its chief office or place of business in this Commonwealth, and notice of the time, place and object of said meeting shall be published once a week for sixty days prior to such meeting, in at least one newspaper published in the county, city or borough wherein such office or place of business is situate.[39]

At the meeting called, pursuant to the second section of this act, an election of the stockholders of such corporation shall be taken for or against such increase, which shall be conducted by three judges, stockholders of said corporation, appointed by the board of directors to hold said election; and if one or more of said judges be absent, the judge or judges present shall appoint a judge or judges, who shall act in the place of the judge or judges absent, and who shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same, well and truly, and according to law, to conduct such election to the best of their ability; and the said judges shall decide upon the qualification of voters, and when the election is closed, count the number of shares voted for and against such increase, and declare whether the persons or bodies corporate holding the larger amount of the stock of such corporation have consented to such increase or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such increase, and the number that voted

(38) Sec. 1, Act April 18, 1874, P. L., 61.

(39) Sec. 2, Act April 18, 1874, P. L., 61.

against such increase, and subscribe and deliver the same to one of the chief officers of said company.[40]

Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting, nor shall any proxy be received or entitle the holder to vote unless the same shall bear date and have been executed within three months next preceding such election or meeting; and it shall be the duty of such corporation to furnish the judges at said meeting with a statement of the amount of its capital stock, with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statements shall be signed by one of the chief officers of such corporation, with an affidavit thereto annexed that the same is true and correct to the best of his knowledge and belief.[41]

It shall be the duty of such corporation, if consent is given to such increase, to file in the office of the Secretary of the Commonwealth, within thirty days after such election or meeting, one of the copies of the return of such election provided for by the third section of this act, with a copy of the resolution and notice calling the same thereto annexed; and upon the increase of the capital stock or indebtedness of such corporation made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase, and in case of neglect or omission so to do, such corporation shall be subject to a penalty of five thousand dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer, as accounts for taxes due the Commonwealth are settled and collected; and the Secretary of the Commonwealth shall cause said return to be recorded in a book kept for that purpose and furnish a certified copy of the same to the Auditor General.[42]

Every corporation shall, within sixty days, when requested by the Auditor General, render to him a report under the oath of its president or treasurer, of the amount of capital stock or bond indebtedness issued pursuant to the provisions of this act, showing

(40) Sec. 3, Act April 18, 1874, P. L., 61.
(41) Sec. 4, Act April 18, 1874, P. L., 61.
(42) Sec. 5, Act April 18, 1874, P. L., 61.

in case of stock to whom issued and the price or consideration received therefor, amount received, and from whom, in money, in labor and in other property; and if so requested, a detailed statement of the character, value and situation of the property so received; and in case of refusal or neglect so to do, shall be subject to a penalty of five thousand dollars for each and every thirty days thereafter such corporation shall refuse or neglect to make such report, which penalty or penalties shall be collected on an account or accounts settled from time to time by the Auditor General and State Treasurer, as accounts for taxes due the Commonwealth are settled and collected.[43]

Every company, except railroad, canal, turnpike, bridge or cemetery companies, and companies incorporated for literary, charitable or religious purposes, which shall increase its capital stock under the provisions of this act shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-quarter of one per centum upon the amount of said increase, in two instalments, the first to be due upon the filing of the certificate required by the preceding section of this act, to be filed in the office of the Secretary of the Commonwealth, and the second instalment one year thereafter: *Provided,* That nothing in this act shall be construed to reduce the amount of bonus to be paid by any company having in its charter a special provision requiring the payment of a bonus at a higher rate than one-quarter of one per centum.[44]

246. Increase of Capital Stock and Indebtedness of "Any Corporation Created by General or Special Law." Act of February 9, 1901, P. L., 3.

There may be some question whether the Act of February 9, 1901, P. L., 3, infra, does not repeal by implication all prior acts relating to increases of capital stock and indebtedness, the language of the repealing clause, contained in Sec. 4, being, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed." Perhaps the better opinion is, however, that the Act of April 18, 1874 (supra Sec. 245), being of exactly the same scope as the Act of 1901, is superseded by the latter act, while the provisions of the Act of April 29, 1874 (supra, Sec. 244) relating only to corporations

(43) Sec. 6, Act April 18, 1874, P. L., 61.
(44) Sec. 7, Act April 18, 1874, P. L., 61.

formed under the provisions of that act and its supplements, are still in force. The question, however, is largely an academic one as no advantage, probably, would result from increasing capital stock or indebtedness under any other act than that of February 9, 1901, which is as follows:

The capital stock or indebtedness, or both, of any corporation created by general or special law may, with the consent of the persons or bodies corporate holding the larger amount in value of its stock, be increased to such an amount in the aggregate of each, without regard to the amount of the other, and regardless of any limitation upon the amount of either, prescribed in any general or special law regulating any such corporation, as it shall deem necessary to accomplish and carry on and enlarge the business and purposes of such corporation. Such increase of either may be made at once or from time to time, as the majority in interest of the stockholders shall determine, as aforesaid; and upon the authorizing of any such increase of indebtedness by the stockholders of such corporation, in the manner hereinafter provided, it shall be lawful for such corporation to secure the payment of the principal or interest, or both, of all or any part of such indebtedness, by mortgage, deed of trust, or other pledge or conveyance, by way of security, of all or any part of its real and personal property, rights, privileges, and franchises, and in such manner and upon such terms as its board of directors may determine.[45]

Any corporation desirous of increasing its capital stock or indebtedness, or both, as authorized by this act, shall by resolution of its board of directors, adopted by a majority of the entire number thereof, declare such purpose, and thereupon by resolution, similarly adopted, direct that the question of such proposed increase shall be submitted to the stockholders of such corporation for their consent; either,

(A.) At any prescribed regular annual meeting or adjournment thereof, the notice whereof, stating *inter alia* that such subject would be considered thereat, shall have been published once a week for sixty days prior to such meeting in at least one newspaper

(45) Act April 22, 1905, P. L., 280, amending Sec. 1, Act February 9, 1901, P. L., 3. The amendment does away with any necessary ratio between capital stock and indebtedness, and also permits corporations other than quasi public ones to mortgage their franchises.

published in the county, city or borough wherein the chief office or place of business of the corporation is situate. At said meeting the question shall be submitted to the stockholders, and it shall be the duty of the president and secretary of said meeting, by such agencies or methods as to them may seem meet, to ascertain whether the persons and bodies corporate holding the larger amount in value of the stock of said corporation shall have consented to such increase, and upon being so satisfied to certify in duplicate the fact, under oath duly administered: *Provided,* That should a stock vote be duly demanded at said meeting, it shall be the duty of the president and secretary, in ascertainment of the fact of the consent, to cause such vote to be taken at the same time and place, by the same persons and in the same manner, as the vote for directors or managers of such corporation shall be taken; or,

(B.) At a special meeting of the stockholders, notice of the time, place and object of which shall have been published once a week for sixty days prior to said meeting in at least one newspaper published in the county, city or borough wherein such office or place of business is situated. At such meeting thus called, or any adjournment thereof, an election of the stockholders shall be taken for or against such increase, which shall be conducted by three judges, stockholders of such corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent the judge or judges present shall appoint a judge or judges who shall act in the place of the judge or judges absent; and said judges shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same, well and truly and according to law to conduct such election to the best of their ability; and the said judges shall decide upon the qualifications of voters, and when the election is closed count the number of shares voted for and against such increase, and declare whether the persons and bodies corporate holding the larger amount of the stock of such corporation have consented to such an increase or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such increase and the number that voted against such increase, and subscribe and deliver the same to one of the chief officers of said company. Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall

entitle the holder or holders thereof to vote at such election or meeting; nor shall any proxy be received, or entitle the holder to vote, unless the same shall bear date and have been executed within four months next preceding such election or meeting; and it shall be the duty of such corporation to furnish the judges, at said meeting, with a statement of the amount of its capital stock, with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation, with an affidavit thereto annexed that the same is true and correct to the best of his knowledge and belief.[46]

It shall be the duty of such corporation, if consent is given to such increase, to file in the office of the Secretary of the Commonwealth, within thirty days after such election, one of the copies of the certificates of the president and secretary of the annual meeting, or one of the copies of the return of such election at the special meeting hereinbefore provided for, with a copy of the resolution and notice calling the same thereto annexed; and thereafter the increase may be made at such time or times as shall be determined by the directors. Upon the actual increase of the capital stock or indebtedness of such corporation made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase actually made, and concurrently therewith such corporation shall pay to the State Treasurer, for the use of the Commonwealth, such bonus on the actual increase shown by said return as shall then be prescribed by law. In case of neglect or omission to make said return, such corporation shall be subject to a penalty of five thousand dollars, in addition to the bonus, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as accounts for taxes due the Commonwealth are settled and collected; and the Secretary of the Commonwealth shall cause said return to be recorded in a book for that purpose and furnish a copy of the same to the Auditor General.[47]

Nothing in this act contained shall be construed as compelling resort to the process herein provided in the case of in-

(46) Sec. 2, Act February 9, 1901, P. L., 3.
(47) Sec. 3, Act February 9, 1901, P. L., 3.

debtedness contracted in the usual course of corporation business. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed: *Provided, however,* That any proceeding for increase of capital stock or indebtedness, begun under existing law prior to and not completed at the date this act becomes effective, shall be consummated under the authority of this act if the antecedent proceeding shall have conformed to its requirements; but if such antecedent proceeding shall not have so conformed, then the proceeding shall be consummated under the provisions of the law existing prior to the passage of this act: *Provided, however,* That the provisions of this act shall not inure to the benefit of any railroad, canal, or other transportation corporation unless such railroad, canal, or other transportation corporation shall, before claiming or using the benefits of this act, file in the office of the Secretary of the Commonwealth an acceptance of all the provisions of article seventeen of the Constitution of this Commonwealth, which acceptance shall be made by resolution adopted at a regular or called meeting of the directors, trustees or other proper officers of such railroad, canal or other transportation corporation, certified under the seal of the corporation, and a copy of which resolution, certified under the seal of the office of the Secretary of the Commonwealth, shall be evidence for all purposes.[48]

(48) Sec. 4, Act of February 9, 1901, P. L., 3.

The first act providing generally for increases of capital stock and indebtedness was that of December 29, 1869, P. L., 1870, p. 1374, which provided that any corporation existing or created under the laws of Pennsylvania might increase its bonded obligations and secure the same by mortgage, and also to increase its capital stock from time to time, "to an amount not exceeding fifty per cent. of the amounts heretofore authorized, and to sell or dispose of the same on such terms and conditions as to said corporation may seem proper." A proviso provided that the act should apply only to corporations accepting its provisions in the manner therein provided, and that bonus shall be paid on increases of capital stock "as now assessed by law on like amounts of the existing capital of the respective corporations."

This was followed by the Act of April 18, 1874, P. L., 61, the provisions of which were incorporated, with little, if any, change in Sections 18-22 of the Act of April 29, 1874, P. L., 81. Section 23 of the latter act provided that corporations formed under said act might decrease their capital stock in the same manner provided for increasing the same, in the sections named. These acts are superseded, though not apparently repealed by the Act of February 9, 1901, supra.

The Act of 1874 provided for the calling of special meetings to pass

A corporation has no right to issue stock nor to increase or reduce its stock without specific legislation authorizing it to do so.[49]

Corporations merging under the provisions of the Act of May 29, 1901, P. L., 349, are not authorized to increase the amount of capital of the consolidated company over the aggregate amount of the capital stocks of the merging companies. Any increase over that amount must be effected under the provisions of the Act of February 9, 1901, supra.[50]

An insurance company incorporated under a special act of Assembly may increase its capital stock under the provisions of the Act of February 9, 1901, P. L., 3.[51]

247. Right of Stockholders to Subscribe to Increase of Stock.

The Pennsylvania decisions have uniformly followed the doctrine laid down in Gray *v.* Portland Bank, 3 Mass., 364 (1807) that original stockholders have a prior right to subscribe to increases of capital stock, in such proportion of the new stock as the number of shares already owned by them, respectively, bears to the whole number of shares before the increase.[52] The rule is the same where a company has bought in shares of its own stock and distributed them among the stockholders, and in such case

upon proposed increases of capital stock. The Act of February 9, 1901, also provides for special meetings for that purpose, and its provisions with regard to proceedings in such case are, in the main, those of the Act of 1874, for which reason Sections 18-22 of said act are not here reproduced, but the Act of 1901 also provides for passing upon proposed increases at regular, annual meetings, when, instead of the formal election by the stockholders, conducted by judges, as provided when the matter is submitted to a special meeting, the president and secretary are to ascertain by such agencies or methods as to them may seem meet, whether the increase is authorized by persons holding the larger amount in value of the capital stock.

Sec. 6 of the Act of April 4, 1868, P. L., 62, provides for the increase of the capital stock of railroad companies formed under the provisions of said act, but is superseded by the Act of April 18, 1874, P. L., 61, supra. Chartiers Connecting Ry. Co., 1 Pa. C. C., 270 (1886) Op. Dep. Atty. Gen.

(49) Cooke *v.* Marshall, 196 Pa., 200 (1900).

(50) Stroudsburg *v.* Bushkill Teleph. Co., Op. Atty. Gen., 16 D. R., 601 (1907).

(51) National Ins. Co. of Allegheny, 28 Pa. C. C., 413 (1903).

(52) Morris *v.* Stevens, 178 Pa., 563 (1897); 39 W. N. C., 370; Reese *v.* Bank of Montg. Co., 31 Pa., 78; Electric Co. of America *v.* Edison Electric Illg. Co., 200 Pa., 516 (1901); Patterson *v.* Buena Vista Ice Co., 16 York, 49 (1902).

the basis of distribution is the number of shares held by the stockholders at the time of the distribution and not at the time of the purchase of the stock.[53]

To maintain an action against a corporation, however, for not allotting to a prior stockholder his proportion of an increase of stock, such stockholder must prove that he demanded it, and offered the price thereof, and that it was refused,[54] and a bill to restrain directors from allotting to themselves certain shares of an increase of capital stock and for the allotment of the same to the plaintiff will be dismissed where the complainant had declined to take any such stock for his own use, and had never demanded any until the stock had been disposed of by the board of directors.[54*]

The measure of damages in the case of such refusal, where the consideration for the new stock has been paid, is the highest price in the market between the breach and the trial. Where the consideration is not paid, the measure of damages is the difference between the consideration and the highest price of the stock, together with the difference between the interest on the consideration and the dividends on the stock,[55] and this though the company became insolvent and made an assignment for the benefit of creditors, pending suit.[56]

It would seem, however, that a stockholder deprived of his right to subscribe to an increase of stock is not confined to an action against the company for damages.

"Nor does it seem just and equitable to restrict the remedy of plaintiffs to a suit against the corporation, such as was brought in said case of Reese *v.* The Bank of Montgomery County. Such a remedy is inadequate and partially inequitable, as plaintiffs would in effect be taking part of the damages recovered out of their own pockets, because their own stock would be diminished in value by reason of the amount paid out of the corporation treasury in the form of damages. Dousman *v.* Wis. Lake Superior Mining Co., 40 Wisconsin, 418." [57]

(53) Coleman *v.* Columbia Oil Co., 51 Pa., 74 (1865). See Dock *v.* Schlicter Jute Cordage Co., 167 Pa., 370 (1895).

(54) Wilson v. Bank of Montg. Co., 29 Pa., 537 (1857). See Hoyt *v.* Shenango Valley Steel Co., 207 Pa., 208 (1903).

(54*) Hoyt *v.* Shenango Valley Steel Co., 207 Pa., 208 (1903).

(55) Bank of Montg. Co. *v.* Reese, 26 Pa., 143 (1856).

(56) Reading Trust Co. *v.* Reading Iron Wks., 137 Pa., 282 (1890).

(57) Morris *v.* Stevens, 178 Pa., 563-8 (1897).

The right to subscribe to an increase of capital stock does not belong to the life tenant of stock, but to the remainder-man.[58]

The Act of May 7, 1887, P. L., 94, entitled "An Act to enforce against Railroad Corporations the provisions of Sec. 7, Art. 16 of the Constitution" relates to street railway companies as well as to steam railroad companies.[59]

The directors of a corporation have no authority to invite sealed bids for new stock and award the same to the highest bidder. The right to subscribe to new stock belongs to the stockholders of the corporation at the time of its issue, and the directors are powerless to deprive them of such right.[60]

While a bonus cannot be exacted of a stockholder as a condition of his subscribing to an increase of stock, yet if he pay the same when demanded he may not recover it back, whether paid under protest or not. The coercion which will render payment under protest involuntary so that it may be recovered must consist of duress either to person or goods. A mere denial of an incorporeal right is not sufficient.[61]

248. Informal Increases.

When a corporation has the power to increase its capital stock no one but the State can complain of the failure of the corporation to file the certificate of increase, as required by Sec. 22 of the Act of April 29, 1874.[62]

The fact that the notice required by law was not given of a meeting to pass upon a proposed increase of capital stock, can be questioned only by the State, and certainly not by a stockholder whose stock was purchased from a former stockholder actually present at such meeting.[63]

(58) Eisner's Estate, 175 Pa., 143 (1896). See Sec. 266.

(59) Cheetham *v.* McCormick, 178 Pa., 186 (1896). See Sec. 462.

(60) Electric Co. of America *v.* Edison Elec. Illg. Co., 200 Pa., 516 (1901).

(61) De La Cuesta *v.* Ins. Co. of N. A., 136 Pa., 62 (1890). See Cunningham's Appeal, 16 W. N. C., 430; 108 Pa., 546 (1885). Note, however, that the decision in the last named case is not now law, owing to the Act of June 29, 1881, P. L., 121, permitting bonus to be exacted for the right to subscribe to new stock of insurance companies.

(62) Appeal of Columbia Nat. Bank, 16 W. N. C., 357 (1885).

(63) Columbia Nat. Bank *v.* Wmsport. Gas Co., 41 Leg. Int., 498.

249. Waiver of Notice of Elections to Increase Capital Stock.

Under a decision of a former Deputy Attorney General, the constitutional provision that sixty days notice shall be given of a meeting to pass upon a proposed increase of capital may be waived, and that is now the usual practice,[64] but the holding of such a meeting may not be waived.[65]

250. Decrease of Capital Stock of Corporations Formed Under the Act of April 29, 1874.

Any corporation created under the provisions of this act, and any corporation of the classes named in the second section hereof that is now in existence by virtue of any law of this Commonwealth, may reduce its capital stock by a vote of its stockholders taken in the manner and under the regulations prescribed in the eighteenth, nineteenth, twentieth, twenty-first and twenty-second sections of this act.[66]

251. Decrease of Capital Stock of Corporations Created Under Any General or Special Act.[67]

The capital stock of any corporation created by general or special law may be reduced from time to time by the consent of the persons or bodies corporate holding the larger amount in value of the stock of such company, provided that such reductions shall not be below the amount of capital stock required by law for the formation of corporations formed for similar purposes.[68]

Any corporation desirous of reducing its capital stock as provided by this act shall, by resolution of its board of directors, call a meeting of its stockholders therefor, which meeting shall be held in its chief office or place of business in this Commonwealth, and notice of the time, place and object of said meet-

(64) Bellefonte & Buffalo Run R. R. Co., 2 Chest. Co. R., 128 (1883); Rep. Atty. Gen., 1895-6, 387. Such a vast amount of capital has been issued with waiver of notice, since the rendering of this opinion, that the courts would probably not make a decision invalidating the same. See, however, Shepp *v.* Norristown Pass. Ry. Co., 2 D. R., 679 (1893).

(65) Tally-on-Top Salesbook Co., Op. Atty. Gen., 17 Pa. C. C., 199 (1895).

(66) Sec. 23, Act April 29, 1874, P. L., 79. There was no provision for decreasing the capital stock of corporations generally, not formed under the Act of 1874, or in existence at the time of the passage of said act, until the passage of the Act of June 8, 1893, P. L., 351, given in the following section.

(67) See Sec. 271a.

(68) Act April 22, 1905, P. L., 264, amending Sec. 1, Act June 8, 1893, P. L., 351.

ing shall be published once a week for sixty days prior to such meeting in at least one newspaper published in the county, city or borough wherein such office or place of business is situate.[68*]

At the meeting called pursuant to the second section of this act, an election of the stockholders of such corporation shall be taken for or against such reduction, which shall be conducted by three judges, stockholders of said corporation, appointed by the board of directors to hold said election, and if one or more of said judges be absent, the judge or judges present shall appoint a judge or judges who shall act in the place of the judge or judges absent, and who shall respectively take and subscribe an oath or affirmation before an officer authorized by law to administer the same well and truly and according to law, to conduct such elections to the best of their ability, and the said judges shall decide upon the qualification of voters, and when the election is closed, count the number of shares voted for and against such reduction, and declare whether the persons or bodies corporate holding the larger amount of the stock of such corporation have consented to such reduction or refused to consent thereto, and shall make out duplicate returns of said election, stating the number of shares of stock that voted for such reduction and the number that voted against such reduction, and subscribe and deliver the same to one of the chief officers of said company.[68**]

Each ballot shall have endorsed thereon the number of shares thereby represented, but no share or shares transferred within sixty days shall entitle the holder or holders thereof to vote at such election or meeting, nor shall any proxy be received or entitle the holder to vote unless the same shall bear date and have been executed within three months next preceding such election or meeting, and it shall be the duty of such corporation to furnish the judges at said meeting with a statement of the amount of its capital stock with the names of persons or bodies corporate holding the same, and number of shares by each respectively held, which statement shall be signed by one of the chief officers of such corporation with an affidavit thereto annexed that the same is true and correct to the best of his knowledge and belief.[69]

(68*) Sec. 2, Act June 8, 1893, P. L., 351.
(68**) Sec. 3, Act June 8, 1893, P. L., 351.
(69) Sec. 4, Act June 8, 1893, P. L., 351.

It shall be the duty of such corporation, if consent is given to such reduction, to file in the office of the Secretary of the Commonwealth, within thirty days after such election or meeting, one of the copies of the return of such election provided for by the third section of this act, with a copy of the resolution and notice calling the same thereto annexed, and upon the reduction of the capital stock of such corporation made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such reduction, and in case of neglect or omission so to do, such corporation shall be subject to a penalty of five thousand dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as accounts for taxes due the Commonwealth are settled and collected, and the Secretary of the Commonwealth shall cause said return to be recorded in a book kept for that purpose and furnish a certified copy of the same to the Auditor General.[69*]

252. Fraudulently Issued Stock.

If, upon the faith of a regularly issued stock certificate, a purchaser or pledgee of the stock, which in fact has been fraudulently and collusively issued by officers of the company, advances money or parts with anything of value, the corporation is bound by way of estoppel to indemnify him to the extent of his expenditure against loss in consequence of the falsity of the certificate. But a holder of such certificate who has received it as collateral security for a pre-existing debt from the person in whose name it was fraudulently issued, has no claim which he can enforce against the corporation. Such certificate is worthless as a certificate. A transfer thereof passes to the transferee no right or claim to shares of stock. The only right which can exist upon it as against the corporation is created by the act of parting with a valuable consideration in reliance upon its statements. When such a certificate is given in pledge, the thing pledged is not shares of stock, but merely a right to call upon the corporation for indemnity against any loss suffered in consequence of reliance upon its representation that the person therein named is the owner of the shares therein mentioned. If a fraudulent certificate

(69*) Sec. 5, Act June 8, 1893, P. L., 351.

is pledged by one who has no claim to indemnity thereon, and the pledgee receives, in settlement of his claim to be indemnified for his advances made on the pledge, genuine shares of stock, surrendering the spurious shares so pledged, such genuine shares do not become a substituted pledge in his hands, but are his absolutely.[70]

A, president of a railroad company chartered by special act in 1857, delivered to B certain stock certificates then standing in A's name, with power of attorney in blank to transfer. The shares were fraudulently issued in excess of the charter limit. It was agreed that transfer should not be made without notice to A. Transfer was not made for several years, during which A became indebted to the company. Held, that Sec. 7 of the General Railroad Act of February 19, 1849, P. L., 79, forbidding the transfer of shares so long as the holder is indebted to the company, was applicable, and that B was not entitled to demand a transfer, or the payment of the amount for which the certificates had been pledged to him, without first discharging A's indebtedness to the company.[71]

A, president of a railroad company, induced B, a stockholder, to give him shares of stock, with blank powers of attorney to transfer, by means of false representations that the same were needed to aid the company. A had no express authority to borrow the stock and the company did not need funds. A gave B his personal due bill, sold the stock and embezzled the proceeds. Afterwards he fraudulently issued stock in excess of the charter limit, and awarded B a number of shares equal to the number by her entrusted to him. Held, that the company was not liable for the acts of A; that he was considered as the agent of B, that B must bear the loss, and that the overissued shares in her hands were invalid and valueless, not having been issued for value.[72]

The vendor of a share of stock impliedly warrants that the

(70) Kisterbock's Appeal, 127 Pa., 601 (1889); 24 W. N. C., 446; 46 Leg. Int., 517; Jeanes' Appeal, 116 Pa., 573 (1887); 2 Pa. C. C., 67 (1886). See Elbert *v.* Patton et al., 2 Pa. C. C., 70 (1886); Elbert *v.* Moffly et al., 2 Pa. C. C., 71 (1886).

(71) Mount Holly Paper Co.'s Appeal, 99 Pa., 513 (1882); 12 W. N. C., 228.

(72) Wright's Appeal, 99 Pa., 425 (1882); 12 W. N. C., 225; 39 L. I., 170.

same is issued by the duly constituted officers of the company, and is sealed with the genuine seal of the corporation. He does not, however, impliedly warrant that such share has not been fraudulently issued by the officers, in excess of the charter limit. If this prove to be the case the vendee has no recourse against him. *Dubitatur,* whether in such case the corporation is bound to permit a transfer on its books, and to deliver a new certificate to the *bona fide* vendee. It may be that it is not obliged to do so. *Semble,* that the *bona fide* holder of a fraudulent over-issued certificate in such case would have a right of action against the corporation, and that his measure of damages would be the market value of the stock at the time a transfer was demanded of him.[73]

Though a certificate of stock is not the title to the stock, it is an authoritative declaration that such a title exists, and a party through whose negligence it passed into the possession of a *bona fide* holder for value will be estopped from denying its validity. Where the president of a corporation fraudulently issued false certificates of stock, properly signed and sealed, in excess of the amount authorized by law, held, that the *bona fide* purchasers were entitled to relief against the company, which could not gainsay its own certificates, and that the measure of damages would be the market value of the stock at the date of a demand made by the holder for a transfer, or, if no demand were made, at the date of beginning action.[74]

The president of a corporation fraudulently issued certificates of stock, properly signed and sealed, in excess of the amount authorized by law. Held, that persons who bought such certificates or took them as collateral were entitled to relief as *bona fide* purchasers on the faith of certificates issued by the company.[75]

When certificates of full paid stock were issued in regular form to a person in consideration of the assignment to the corporation issuing the same of property which he, in fact, did not own, an innocent purchaser for value, without notice, is not subject to assessment on the shares so purchased by him.[76]

Stock in a corporation issued at less than par is fraudulent, and

(73) People's Bank *v.* Kurtz, 99 Pa., 344 (1882); 11 W. N. C., 225.
(74) Willis *v.* Phila. & Darby R. R. Co., 6 W. N. C., 461 (1878).
(75) Willis *v.* Fry, 13 Phila., 33 (1879).
(76) Gumpert *v.* Finwood Lace & Trimming Co., 32 Pa. C. C., 350 (1906).

a purchaser thereof, without knowledge of the fraud, who has paid for it and has had a regular transfer of it on the books of the company is entitled to a recission of his contract and to an action against his vendor for the money paid.[77]

Where additional stock was issued to a director without giving the other subscribers an opportunity to subscribe for it, which stock he paid for and the money was used for corporate purposes by the corporation, and the director subsequently sold a portion of the new issue to one without knowledge of the illegality of the issue, held, that the assignee of such portion of the stock was entitled to hold the same, and that while it would be inequitable to cancel the new stock of the director for which he had paid, it was proper to continue a preliminary injunction restraining him from voting or selling or disposing of it.[78]

When it appears on the face of a stock certificate that it will not be valid unless countersigned by a transfer agent and the name of such transfer agent is forged thereto the corporation will not be held liable for negligence because after the certificate had been completely executed, save the signature of the transfer clerk, it was left where a clerk had access to it and forged such signature. "It is only when a party holds a certificate to which is attached the genuine signatures of the parties who must sign it to make it good, that the question arises whether or not the company is liable to him, because of negligence, when the certificate is in fact false by reason of having been improperly or fraudulently issued." [79]

A member of a building and loan association surrendered her passbook and received the withdrawal value of her stock. Thereafter the secretary of the association without the knowledge of the association or its officers, fraudulently delivered the book to another person who paid him in good faith the withdrawal value of the stock which the secretary then embezzled. It appearing that the secretary had no authority express or implied to reissue the stock, held, that the association was not liable for the loss incurred by the person purchasing the stock.[80]

(77) Fosdick *v.* Sturges, 3 Phila., 312 (1855).

(78) Morris *v.* Stevens, 178 Pa., 563 (1897).

(79) Dollar Savings & Trust Co. *v.* Pittsburg Plate Glass, 213 Pa., 307 (1906).

(80) Loucheim *v.* Somerset B. & L. Assn., (No. 2) 25 Pa. Super. Ct., 336 (1904).

253. Illegally Issued Stock.

Sec. 7, Art. XVI, of the State Constitution[81] relative to increases of stocks and bonds is not self-executing, and where acts are passed to carry the same into effect the remedies provided therein must be strictly pursued.

The Act of May 7, 1887, P. L., 94,[82] relative to the issue of capital stock by railroad companies, provides that it shall be the duty of the Attorney General to institute proper proceedings, on the complaint of any stockholder, or of two reputable citizens, to enforce the provisions of the act. The remedy thus afforded is exclusive and no suit can be maintained against the corporation by the stockholders to declare the stock invalid. It seems, however, that the Attorney General may proceed by quo warranto as well as in the manner provided in the act. Com. ex rel. *v.* Pgh. Ebensburg and Eastern R. R. Co., 32 Pa. C. C., 401 (1906); Com. ex rel. *v.* Altoona and Philipsburg Connecting R. R. Co., 32 Pa. C. C., 449 (1906).

The Act of May 4, 1893, P. L., 29[83] gives the Courts of Common Pleas chancery jurisdiction in disputes between stockholders and parties claiming to be stockholders, but this act merely gives jurisdiction, and does not change the provisions of the Act of 1887 as to who alone can act for a violation of its provisions.[84]

A bill in equity filed by the Attorney General under the provisions of the Act of May 7, 1887, P. L., 94, to declare void an issue of capital stock made practically without consideration and fictitious, will be dimissed where the court finds that the stock was sold by the parties to whom it was issued to third persons for value before the bill was filed and that the complainants had been guilty of laches in applying for a bill.[85]

254. Preferred Stock.

Every corporation created under the provisions of this act,

(81) See Section 32.

(82) See Secs. 1558-1562.

(83) See Sec. 578.

(84) Yetter *v.* Delaware Valley R. R. Co., 206 Pa., 485 (1903).

(85) Com. ex rel. *v.* Reading Traction Co., 204 Pa., 151 (1902); 25 Pa. C. C., 156, 583.

or accepting its provisions, may, with the consent of a majority in interest of its stockholders, obtaining at a meeting to be called for that purpose, of which public notice shall be given during thirty days in a newspaper of the proper county, issue preferred stock of the corporation, the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of the net earnings of the corporation.[86]

It shall be lawful for any company now or hereafter incorporated, by or under any general law of this Commonwealth, to issue, with the consent of a majority in interest of its stockholders, preferred stock of the company, not exceeding at any time one-half of the capital stock of the corporation; the holders of which preferred stock shall be entitled to receive such dividends thereon, not exceeding twelve per cent. per annum, as the board of directors of said company may prescribe, payable out of the net earnings of the company; and the holders of said preferred stock shall not be liable for any debts of the company.[87]

Any company authorized by the act to which this is a supplement, to issue preferred stock, may issue the same in different classes, to be distinguished in such manner as the directors of such company may prescribe; and they may give to the various classes such order of preference in the payment of the dividends, or in the rate of dividends thereon, or in the redemption of the principal thereof, as may be approved by the holders of a majority of the stock of the company; and the company shall have the right to redeem its preferred stock upon such terms as may be prescribed in the issue thereof; and it may specifically appropriate for the payment of the dividends upon any class of stock, or for the redemption of the principal thereof, the revenues from any specific department of its business or the proceeds of any specified portions of its assets or property: *Provided,* That no injustice shall thereby be done to the existing rights of other stockholders or creditors of the company.[88]

It shall be lawful for any bridge company, incorporated by any special law of this Commonwealth, with the consent of a majority in interest of its stockholders, obtained at a meeting to be

(86) Sec. 16, Act April 29, 1874, P. L., 81.
(87) Sec. 1, Act April 3, 1872, P. L., 37.
(88) Act of April 28, 1873, P. L., 79, Sec. 1.

called for that purpose, of which public notice shall be given during thirty days, in a newspaper of the proper county, issue preferred stock of the company, not exceeding the one-half of the capital stock of the corporation at such time; the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors may prescribe, not exceeding twelve per centum per annum, payable out of the net earnings of the corporation.[89]

The stock authorized by the above acts of 1872 and 1873 is not what is usually meant by "preferred stock," but a statutory substitute therefor. These acts follow in the main the Act of March 30, 1855, P. L., 158, authorizing the West Chester and Philadelphia Railroad Company to issue preferred stock. Of the stock issued under the provisions of said act the court said in West Chester and Philadelphia R. R. Company *v.* Jackson, 77 Pa., 321 (1875) that it was a contract for the advancement of money to the company, the same as a purchase of its bonds, and was only a form of mortgage.

By preferred stock is ordinarily meant stock which entitles the holder to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings.[90] In other respects the holder is in precisely the same position both with respect to the corporation itself and with respect to corporate creditors as the holders of common stock.[91]

The term "guaranteed stock" is generally used interchangeably with "preferred stock," but guaranteed stock differs from preferred in that the dividend thereon is guaranteed, so that if there are no profits out of which the dividend can be paid at the time when it is payable according to the terms of the guaranty, the dividend is not necessarily lost, but the holder of the stock will be entitled to payment of all arrears before any payment can be made to the holders of common stock. Preferred stock will, however, generally be held to be guaranteed stock, unless by the terms of the contract the dividends in each year are made dependent on the profits for such year.[92]

The preferred stock provided for by Sec. 16 of the Act of

(89) Sec. 1, Act May 1, 1876, P. L., 91.
(90) Cook on Corpns., Sec. 267.
(91) Clark & Marshall's Private Corpns., Sec. 417c.
(92) Clark & Marshall's Private Corpns., Secs. 514, 529 (d).

April 29, 1874, being of a different character from that provided for by the Acts of 1872 and 1873, it follows that none of the restrictions imposed by these acts apply to the issue of preferred stock by corporations formed under the provisions of the Act of 1874 and its supplements.

Corporations have an implied power to issue preferred stock, in the absence of restriction or prohibition, subject to the qualification that it must be exercised for legitimate corporate purposes and that the contract rights of the stockholders cannot be impaired, and it follows, therefore, that corporations not formed under the provisions of the Act of April 29, 1874, may issue preferred stock, subject to the qualification mentioned.

Where a railroad company has the power to issue preferred stock, it may cancel common stock issued, held and owned by it, and issue preferred stock in place thereof, either as part of a larger issue of such preferred stock or to that amount only.[93]

Certificates of preferred stock set forth "The holders of preferred stock of said company are entitled to dividends out of the net earnings of each year, when declared by the board of directors" etc. On a bill in equity to compel the declaration of a dividend on such stock, it appeared that the corporation had greatly increased its plant, thereby incurring indebtedness and that the directors had thought it expedient to apply all the earnings of that year toward the payment of said indebtedness. The liabilities were double the assets. Held, that the discretionary power of the directors had been properly exercised and that the plaintiffs were not entitled to relief.[94]

A holder of preferred stock, issued at the time of organization, is entitled to the rights and subject to the conditions imposed upon those shares by the by-laws of the corporation, and where such by-laws give the holders of preferred stock in case of default in payment of dividends, all the rights of holders of common stock, they have the standing of stockholders, and not of simple creditors, and may examine the books of the corporation with a view to enjoining it from the exercise of illegal acts that may seriously affect their investment.[95]

(93) Com. *v.* Buffalo & Susquehanna R. R. Co., 26 Pa. C. C., 635 (1902).

(94) McLean *v.* Pitts. Plate Glass Co., 159 Pa., 112 (1893); 33 W. N. C., 459.

(95) Marshall *v.* American Caramel Co., 9 D. R., 152 (1900).

The case of West Chester & Philadelphia R. R. Co. *v.* Mary Jackson, Executrix, 77 Pa., 321 (1873) is thus explained in a later case:

"In the case cited . . . . the preferred stock was issued when the corporation was financially embarrassed, to raise funds for its relief. An eight per cent. dividend, payable semi-annually, was provided, payable before the other stockholders should receive any dividend. The majority of preferred stockholders surrendered their stock, taking other consolidated stock. Mrs. Jackson . . . . retained the original stock. Upon the declaring of a dividend by the corporation Mrs. Jackson claimed not only one year's dividend but dividends for other previous years, in which the corporation had failed to pay dividends. The claim was sustained by the court below, and, on appeal, the Supreme Court affirmed the judgment, because the advancing of money for the original preferred stock was 'in effect an agreement for the advance of money to the embarrassed railroad company,' 'and the preferred stock was not designed to form a permanent part of the capital.' It was for these reasons that the holder of the original preferred stock, in said action, was entitled to recover, for preferred stock issued under the conditions existing in said case was 'only in the form of a mortgage.'"[95]

A change in the charter of a railroad company by which it is authorized to issue preferred stock, which act is accepted by a majority of the stockholders, is not such a radical change in the structure and object of the company as will exonerate an original stockholder from liability on his subscription.[96] One dissenting stockholder, in such a case, has no power to prevent the issuing of the preferred stock.[97]

Where preferred stock was owned by a stockholder in a corporation the redemption of which under the provisions of its issue it was claimed that he was entitled to demand, it was held that no holder of such stock had a right to its redemption if it would work injustice to the creditors or stockholders of the company by interrupting or crippling its business, and that where it appeared that there was no money in the treasury in excess of the requirements of the current business, a contract to pay the debt of an officer of the company, in consideration of an agreement on the part of the stockholder not to demand the redemption of his stock, was invalid, and that, no consideration passing in such case to the company, it was not liable as a principal, and its officers had no authority to bind it as a surety.[98]

Where the holders of preferred stock of a corporation are de-

(96) Everhart *v.* W. Chester & Phila. R. R. Co., 28 Pa., 339 (1857).
(97) Curry *v.* Scott, 54 Pa., 270 (1867).
(98) Culver *v.* Reno Real Estate Co., 91 Pa., 367 (1879).

clared by the charter of the company to be entitled to a fixed sum per annum, without limiting the sum to be paid as dividends to profits earned when made within a designated period, the holders of the preferred stock have a prior claim over the common stockholders on subsequent dividends to make up the deficiency.[98*]

The Act of March 4, 1850, P. L., 129, incorporating the Beaver Meadow Railroad and Coal Company, authorized the issue of preferred stock, and provided as follows: "And the said additional stock so issued shall be entitled to a preference over all the other stock of the said company, in every future dividend of profits which may be declared by the said company, until the holders of such additional stock shall have been paid from the funds applicable to the payment of such dividend, ten per cent. per annum on the amount of the capital stock of the company represented by said shares of additional stock so held by them respectively; and the holders of the other stock of the company shall not be entitled to participate in any future dividend of the profits of the company until the holders of said additional stock shall have been paid from the funds applicable to such dividend, ten per cent. per annum on the amount of the capital stock of the company represented by said additional shares so held by them respectively." Held, that the dividends on the preferred stock were cumulative.[98**]

Where in three particular years the preference stock was paid a ten per cent. dividend, and a like dividend was paid on the common stock, and an extra dividend was also divided equally between the preferred and common stock, and there followed a series of years in which no dividends were paid, the preference shareholders, on the resumption of dividends, are entitled to arrearages without any deduction for the share of the extra dividend which they received.[98***]

A corporation chartered prior to the Constitution of 1874 with power to increase its capital and borrow on bond and mortgage may issue preferred stock.[99]

(98*) Fidelity Trust Co. *v.* Lehigh Valley R. R. Co., 215 Pa., 610 (1906).

(98**) Fidelity Trust Co. *v.* Lehigh Valley R. R. Co., 215 Pa., 610 (1906).

(98***) Fidelity Trust Co. *v.* Lehigh Valley R. R. Co., 215 Pa., 610 (1906).

(99) Hoffman *v.* Penna. Warehousing & S. D. Co., 43 Leg. Int., 250 (1886).

Corporations incorporated by special acts were sometimes authorized to issue preferred stock upon terms prescribed in such acts, respectively.

Where a company so incorporated was authorized to issue preferred stock upon the following terms: "And the said additional stock, so issued, shall be entitled to a preference over all the other stock of the said company, in every future dividend of profit which may be declared by the said company until the holders of such additional stock shall have been paid from the funds applicable to the payment of such dividend, ten per centum on the amount of the capital stock of the company represented by said shares of additional stock so held by them respectively; and the holders of the other stock of the company shall not be entitled to participate in any future dividends of the profits of the company until the holders of said additional stock shall have been paid from the funds applicable to such dividend, ten per cent. per annum on the amount of the capital stock of the company represented by said additional shares so held by them respectively," it was held that the dividends on the preferred stock were cumulative.[99*]

There is no authority of law for the chartering under the general incorporation acts, of companies with preferred stock. The law contemplates the formation of corporations with common stock only, other forms of stock to be subsequently issued as occasion may require. Corporations, however, are not infrequently chartered with provisions for the issue of preferred stock in their articles of association, and the right to do so is, apparently, recognized in Marshall *v.* American Caramel Co., 9 D. R., 152 (1900).

There is no legal distinction between interest bearing and preferred stock. Where a resolution of the stockholders of a corporation formed under the provisions of the Act of April 29, 1874, authorized the issue of preferred stock "under and subject to the laws of Pennsylvania governing the relation of preferred and common stock issued by corporations created under the laws of the State" and further bound the company unconditionally to the payment of the interest stipulated, held, that interest on such stock was payable only out of the net earnings of the corporation.[99**]

(99*) Fidelity Trust Co. *v.* Lehigh Valley R. R. Co., 215 Pa., 610 (1906).
(99**) Krug *v.* Ketterer Mfg. Co., 16 D. R., 923 (1907).

255. Deferred Stock.

. . . . Every such corporation may provide for the issue of deferred stock in payment for such real or personal estate or mineral rights, and, if so provided, it shall be expressly stated in the charter filed, or in a certificate to be made and recorded, or in the acceptance of this statute to be filed by any corporation accepting its provisions, with the amount of such deferred stock, and the consideration of the same, and the terms on which the same shall be issued; and the said stock may be made to await payments of dividends thereon, until out of the net earnings at least five per centum has been declared and paid upon the other full paid stock of the corporation.[100]

256. Special Stock.

Companies incorporated under the provisions of this act for the carrying on of any mechanical, mining, quarrying, manufacturing or other business, as provided in clause eighteen of the second class, in section two hereof, when not otherwise provided in this act, shall, from the date of the letters patent creating the same, have the powers and be managed and controlled as follows:

Every such corporation may have a capital stock not exceeding five million dollars, and may by a vote of three-fourths of the general stockholders, at a meeting duly called for the purpose, issue two kinds of stock, namely: General stock and special stock; the special stock shall at no time exceed two-fifths of the actual capital of the corporation, and shall be subject to redemption at par, after a fixed time to be stated in the certificates. Holders of such special stock shall be entitled to receive, and the corporation shall be bound to pay thereon, a fixed or half yearly sum or dividend to be expressed in the certificates, not exceeding four per centum, and they shall in no event be liable for the debts of the corporation beyond their stock.[1]

257. Permanent and Ordinary Stock.

Sec. 3 of the Act of June 7, 1887, P. L., 365, authorizing the

(100) Sec. 17, Act April 29, 1874, P. L., 81, and supplement of April 17, 1876, Sec. 4, P. L., 32.

(1) Sec. 39, Act April 29, 1874, P. L., 101. This provision for special stock is taken from the Mfg. Act of April 18, 1863, Sec. 14, P. L., 1864, 1104. It appears that there is an exactly similar provision for special stock in the laws of Massachusetts. See Cook on Corpns., Sec. 276.

formation of coöperative associations provides that associations formed under the provisions of the act may issue two classes of shares, one of which classes shall be sold and known as permanent stock, which shall not be withdrawable, but may be transferred, and ordinary stock which may be repaid, transferred or withdrawn in accordance with the by-laws of such association.

258. Change of Par Value of Shares.

It shall be lawful for any corporation, organized under the laws of this State, to change the par value or face value of the shares into which its capital stock is divided. Such change shall be authorized by a vote of a majority of the stockholders of any such company, present in person or by proxy at any annual meeting, or any special meeting duly called for that purpose. Such change of the par value of the capital stock shall not be taken to increase or diminish, or change in any way, the total aggregate par value of the capital stock which said company may be authorized to issue or may have issued, but only to change the number of shares into which the same may be divided.

In case the stockholders, so present at such meeting, shall vote to increase or diminish the par value of the shares of the capital stock of the company, as above provided, it shall be the duty of the proper officers of the company to file a certificate of the fact in the office of the Secretary of the Commonwealth, under the seal of the corporation; and thereupon the proper officers of such corporation shall issue to the stockholders the proper number of shares of the capital stock of the new par value, in exchange for outstanding shares of the former par value, upon the surrender of such outstanding shares by the respective holders and the cancellation thereof.[1*]

Where a corporation set apart as capital a fund accumulated from the rental of its cars, and subsequently, in good faith, in reduction of its capital stock, paid therefrom to its stockholders twelve dollars per share, reducing the par value of each share by

(1*) Act of July 2, 1901, P. L., 606. Prior to the passage of this act the par value of shares might be increased or decreased under the provisions of Sec. 4, of the Act of April 17, 1876, P. L., 32, amending Sec. 17, of the Act of April 29, 1874, in the same manner provided for the increase of capital stock by Sections 18-22 of said Act of 1874.

that amount, held, that such payment did not amount to a stock dividend.[2]

259. Sales of Stock—Specific Performance.

Specific performance of a contract for the sale of shares of stock will not ordinarily be decreed, because there is usually an adequate remedy at law, inasmuch as a jury can have no doubt as to the proper measure of damages.[3]

But specific performance will be decreed where an adequate remedy cannot be afforded in damages, as where the damages could not be computed because payment for the stock was by instalments extending over a series of years, the amount of profits depending on the profits of the corporation.[4] Specific performance was also decreed in a case where the contract was for the sale and purchase of almost the whole of the bonds and stock of a corporation. "These securities cannot be had nor obtained except under and by force of this particular contract. They cannot be bought in the general market because they do not exist."[5]

Specific performance will not be decreed when the complainant has neglected for three years to enforce her rights, with no explanation of the cause of delay, and when the stock has, in the meantime, greatly increased in value. In such case the complainant's remedy, if any she have, is at law.[6]

260. Where Specific Performance is Required in Order to Gain Control of a Corporation.

It has been held that, because of reasons of public policy, equity will not decree specific performance of a contract to sell certain shares of stock to a bank, where such shares are sought for to control the bank.[7] And in a later case: "That the motive of plaintiff, the buyer, was to secure control of the railway company, is of no moment in a court of equity and is no element

(2) Commonwealth *v.* Central Transp. Co., 145 Pa., 89 (1891).

(3) Rigg et al. *v.* Reading & S. St. Ry. Co., 191 Pa., 298 (1899); Edelman *v.* Latshaw, 159 Pa., 644 (1894); Foll's Appeal, 91 Pa., 434 (1879).

(4) Goodwin Gas Stove & Meter Co.'s Appeal, 117 Pa., 514; Rigg et al. *v.* Reading and Southwestern St. Ry. Co., 191 Pa., 298 (1899).

(5) Northern Central Ry. Co. *v.* Walworth, 193 Pa., 207 (1899). See also Eichbaum *v.* Sample, 213 Pa., 216 (1905); Rumsey *v.* N. Y. & Pa. R. R. Co., 203 Pa., 579 (1902).

(6) Schimpff *v.* Dime Deposit & Discount Bank, 208 Pa., 380 (1904).

(7) Foll's Appeal, 91 Pa., 434 (1879).

from which to infer impracticability in computation of damages."[8]

261. Measure of Damages for Failure to Deliver Stock.

Where there is a trust relationship between the parties, or where by contract there is an obligation to deliver certain specific certificates of stock, the measure of damages is, the highest price between the date when the stock should have been delivered and the date of trial, or the market price on the date of trial, with interest, dividends and increment thereon from the time default was made,[9] but in cases purely contractual, and where there is no obligation to deliver specific shares, the measure of damages is, the market value on the day when the stock should have been delivered, with simple interest to the time of trial.[10]

In an action on a contract for the sale of specific shares which without the knowledge of the vendor have already been sold to another by his agent, the plaintiff can recover nominal damages only.[11] But where there is an agreement for the sale of specific shares of stock, represented by a particular certificate, and the vendor has tendered the delivery of the particular shares of stock, as required by the contract, he is entitled to the purchase price.[12]

Where a vendor of stocks has tendered the delivery of the particular shares of stock stipulated by the contract of sale, the rule that "in executory contracts for the sale of goods not specific, the measure of damages for the refusal of the buyer to accept the same is the difference between the price agreed upon and the market value on the day appointed for delivery" does not apply, and the vendor is entitled to the purchase price.[13]

262. Conditional Sales of Stock.

Where a person borrowing money from another assigns stock

(8) Rigg et al. *v.* Reading & S. St. Ry. Co., 191 Pa., 298 (1899). See, however, Rumsey *v.* N. Y. & Pa. R. R. Co., 203 Pa., 579 (1902).

(9) Bank of Montg. Co. *v.* Reese, 26 Pa., 143 (1856); Huntingdon & B. T. R. R. Co. *v.* English, 86 Pa., 247 (1878); 5 W. N. C., 354.

(10) Huntingdon & B. T. R. R. Co. *v.* English, 86 Pa., 247 (1878); Wilson *v.* Whitaker, 49 Pa., 114 (1865); Work *v.* Bennett, 70 Pa., 484 (1872); North *v.* Phillips, 89 Pa., 250 (1879); Keohane *v.* Quinn, 18 Pa. Super. Ct., 443 (1901).

(11) Wilson *v.* Whitaker, 49 Pa., 114 (1865).

(12) Reynolds *v.* Callendar, 19 Pa. Super. Ct., 610 (1902).

(13) Reynolds *v.* Callendar, 19 Pa. Super. Ct., 610 (1902). See Sec. 263.

to the lender upon an agreement that, as consideration for the transfer, the stock should be transferred back to the borrower on payment of the money advanced at any time he should be able to pay the amount of the loan, held, that the owner might redeem upon making the proper tender, whether the transaction be considered as a pledge of the stock for the debt, or a sale with an option in the vendor to repurchase it on specified terms.[14]

263. Fraudulent Sales of Stock.

There can be no recovery for deceit in the sale of stock without proof that the sale was effected by means of representations made to the buyer which were known to the seller to be false. The measure of the plaintiff's damages in an action for deceit in the sale of stock, is the difference between the real value of the stock at the time of the sale and the fictitious value at which he was induced to purchase.[15]

In an action on the case for deceit brought against the stockholders of a corporation, by the purchaser of the stock, alleging that the land of the company was worth but $8,000, whereas it was represented that it cost and was worth $37,500, and other misrepresentations were made, held, that to warrant a recovery in such an action the representations must be both false and fraudulent, and such as to induce and actually induce the party to part with his money. It must be affirmatively shown that the fraudulent representations came to the plaintiff's knowledge, and induced him to give the credit which resulted in the loss, and that if agents of a corporation to purchase land, transfer it to the corporation at a higher price than they gave, this is a fraud on the company which it alone can redress.[16]

264. Agreements Among Stockholders as to Sales of Stock.

Such agreements, without the unanimous consent of all persons signing the same, are a restraint upon alienation and void as against public policy.[17] When several manufacturers unite to form a corporation to secure natural gas for their establishments and to guard themselves against an increased price of gas, and it is agreed that none of the parties shall sell his stock to outside par-

(14) Eichbaum *v.* Sample, 213 Pa., 216 (1905).
(15) High *v.* Berret, 148 Pa., 261 (1892).
(16) McAleer *v.* McMurray, 58 Pa., 126 (1868).
(17) White *v.* Ryan, 15 Pa. C. C., 170 (1894).

ties without first giving his associates an opportunity to purchase it at the same price that could be gotten from outside parties, one of the parties to the agreement cannot prevent the others from selling their stock, where, under the terms of the sale, all of the parties are protected in the very purpose for which the corporation was formed.[18] In a later case, however, a similar agreement was enforced.[19]

An agreement among all the stockholders of a private trading corporation that in the event of the death of one or more of them, the remainder should have the option to purchase the stock of the decedents at its book value, is neither illegal, contrary to public policy nor an improper restraint upon alienation, and the Orphans' Court has exclusive jurisdiction to specifically enforce such an agreement by a decedent.[20]

265. Sales on Margin—Gambling Contracts.

It was originally held that the criterion whether or not contracts for the purchase of stocks upon margins, upon speculation, were valid or not was, whether or not an actual delivery of the stock was contemplated. If no such delivery was contemplated, the contract was held to be invalid.[21]

The rule laid down in the earlier cases has, however, been much relaxed:

"The true line of distinction was laid down in Peters *v.* Grim, 149 Pa., 163, and has not been departed from or varied. 'A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows the money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrowing the money from B, a third person, he borrows it from A,

(18) Streator *v.* Paxton, 201 Pa., 135 (1902).

(19) Boswell *v.* Buhl, 213 Pa., 450 (1905).

(20) Fitzsimmons *v.* Lindsay, 205 Pa., 79 (1903). 210 Pa. 274

(21) Brua's Appeal, 55 Pa., 294 (1867); Smith *v.* Bouvier, 70 Pa., 325 (1872); Maxton *v.* Gheen, 75 Pa., 166 (1874); North *v.* Phillips, 89 Pa., 250 (1879); Waugh *v.* Beck, 114 Pa., 422 (1886); Hall *v.* Law, 1 Pa. C. C., 477 (1886); Merriam *v.* Public Grain & Stock Exchange, 1 Pa. C. C., 478 (1886); Gaw *v.* Bennett, 153 Pa., 247 (1893); Kirkpatrick & Lyons *v.* Bonsall, 72 Pa., 155 (1872); Fareira v. Gabell, 89 Pa., 89 (1879); Dickinson's Exrs. *v.* Thomas, 97 Pa., 278 (1881); Harper *v.* Young, 112 Pa., 419 (1880); Griffith *v.* Sears, 112 Pa., 523 (1880).

or, in the language of brokers, procures A to "carry" the stock for him, with or without margins, the transaction is not necessarily different in character. But, in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery . . . . then the transaction was a mere wager on the rise and fall of prices, but if there was in good faith a purchase, then the delivery might be postponed, or made to depend upon a future condition, and the stock carried on margin or otherwise, in the meanwhile, without affecting the legality of the operation.' This has been uniformly followed. Hopkins *v.* O'Kane, 169 Pa., 478 (1895); Wagner *v.* Hildebrand, 187 Pa., 136. And the rule goes so far that an agreement for an actual sale and purchase will make the transaction valid, though it originated in an intention merely to wager. Anthony *v.* Unangst, 174 Pa., 10." [22]

And when there has been a long course of dealings in stocks between a dealer and customer, and the latter has finally treated the last transaction as a purchase and settled with the broker on this basis, paying his indebtedness and taking away all his stocks, the settlement will legitimate all prior transactions, no matter what may have been their original character.[23]

And in a recent case the Superior Court, in deciding that speculations in stocks on margins is not such a game of address or hazard or other play as is contemplated by the Act of April 22, 1794, Sec. 9, 3 Sm. Laws, 177, seems to intimate that any kind of contract for gambling is legitimate under the decisions of the Supreme Court.[24]

Where a stock broker and a customer engage in a series of wagering transactions in a particular stock, which amount to gambling, and the customer finally demands a delivery of the stock, and the broker agrees thereto, the customer is liable to the broker for the price of stock, and his contract is not rendered invalid by his previous wagering transactions with the broker.[25]

(22) Taylor & Company's Assigned Estate, 192 Pa., 304, 309, 311 (1899).

(23) Young, Smyth, Field & Co. *v.* Glendenning, 194 Pa., 550 (1900).

(24) Hirst *v.* Maag, 13 Pa. Super. Ct., 4 (1899); Merriam *v.* Public Grain & Stock Exchange of N. Y., 1 Pa. C. C., 478 (1886).

(25) Anthony & Co. *v.* Unangst, 174 Pa., 10 (1896).

A court of equity will not lend its aid to a party *sui juris* to recover the money he has invested and lost in stock gambling.[26]

Where a negotiable promissory note was delivered to a broker to secure him against loss in stock transactions, and actually negotiated by the broker for payment of the very losses for which it was pledged, and the note is held by an innocent purchaser without notice, a court of equity will not compel the return of the note because it was given to the broker for a gambling debt.[27]

"The case of Peters et al. *v.* Grim, 149 Pa., 163, and Gaw *v.* Bennett, 153 Pa., 247, hold that a purchase and sale on margins is not necessarily illegal, but they both adhere to the rule that a contract that appears to be an illegal and gambling contract is one with which the courts will not interfere to assist either the unpaid winner or the loser who has paid his losses."[28]

Where the profits of stock transactions are paid over by a broker to his customer, but the amount of the original margin is left in the hands of the broker, the customer may recover the margin in an action against the broker.[29]

"In Fareira *v.* Gabell . . . . it was held . . . . that a wagering contract is one in which the parties in effect stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss; and whether the contract is a wagering one or not is a question for the jury, unless the entire contract, unexplained by oral testimony, is in writing. Also that notes, given to a broker to cover losses incurred in stock gambling operations, are void; that money advanced by a broker to pay such losses cannot be recovered, nor can the broker's commission be recovered, because the whole transaction is unlawful."[30]

A judgment entered on a judgment note given to a broker to secure margins will not be opened where the evidence shows that the broker at defendant's request and with the defendant's money

(26) Ruchizky *v.* DeHaven, 97 Pa., 202; Stewart *v.* Parnell, 147 Pa., 523 (1872).

(27) Albertson *v.* Laughlin et al., 173 Pa., 525 (1896). But see Fareira *v.* Gabell, 89 Pa., 89 (1879).

(28) Albertson *v.* Laughlin et al., 173 Pa., 525 (1896).

(29) J. C. McNaughton Co. *v.* Haldeman, 160 Pa., 144 (1894).

(30) Gaw *v.* Bennett, 153 Pa., 247 (1893). But see Albertson *v.* Laughlin, 173 Pa., 525 (1896).

bought shares of stock and received and retained the certificates until at defendant's request they were sold again; that the proceeds of the stock were retained by the broker, and used by him in part payment of other stocks purchased at defendant's request; and that the purchase and sale of stocks continued in this way until the defendant was in the broker's debt, when the judgment note was given to secure the balance due.[31]

To constitute a transaction between a stock broker and his customer a gambling contract it must appear that both parties intended that there was to be no bona fide purchase of stock but a mere settlement on the basis of the fluctuations of the same. It is not enough that the customer did not intend to pay for the stock, if the broker show that he intended to purchase it and was ready to deliver it when called upon to do so.[32]

266. Life Estates and Remainders in Stocks.

A testator devised the residue of his estate to executors "in trust to collect the rents, income and interest, and to pay one equal fourth part" for the use of each of his children. Among the residuary estate was stock held by the testator in a manufacturing company, upon which large surplus profits over the current dividends declared had accumulated and continued to accumulate for several years after his death, when, with the consent of executors and legatees, the capital stock of the company was increased and the new stock distributed among the stockholders in proportion to the stock held by them respectively, the old certificates issued to the testator were surrendered and cancelled and new certificates for the whole amount of stock, including the increase, were issued to the executors, the surplus earnings or profits being applied to the payment of such new shares. Held:

That the surplus fund, as above, at the time of the death of the testator was a part of the principal of the fund and subject to the trusts in the will, and was so essentially a part of the stock itself that it would have passed by the sale of the stock alone; that there was no bequest to the legatees of the stock itself, but only of its income, and their interest in that is limited to the rents or dividends accruing after the death of the testator; that the

(31) Hopkins' Receiver *v.* O'Kane, 169 Pa., 478 (1895).
(32) McDonald *v.* Gessler, 208 Pa., 177 (1904).

accumulations on the stock after the death of the testator were as much a part of the income of the principal as the current dividends, and as such belong to the legatees of the income or profit for life, and that the value of the stock held by the testator at the time of his death, represented by an equal amount in value of the new stock, is the principal, and the remainder, though in the form of certificates of stock, is to be regarded as income since his death and to be distributed accordingly.[33]

Part of a trust fund for life consisted of stock in two corporations. One ordered an increase of stock to be distributed to the old stockholders on the payment of seventy-five dollars per share. The trustee sold the privilege to subscribe. The other corporation made a similar order. The trustee advanced money, subscribed for the stock, sold it at an advance, and carried what was received in both cases to the trust account. Held, that these items were income and not capital; that the right of subscription belonged to the trust estate; that the price obtained by the trustee was equivalent to a premium on the sale of stock, and that the earnings or profits of stocks of a decedent made after his death are income, though in the form of capital by the issue of new stock.[34] Of this case it is said in a later case: "Wiltbank's Appeal has never been over-ruled, although it has not been followed where the subscribers acquired their right as such by reason of their being already holders of stock, the intrinsic value of which would manifestly be impaired by increasing the number of stockholders." [35]

Where a corporation sells part of the original franchise and property and distributes the proceeds of the same as a dividend among its stockholders, such dividend will be regarded, as between the tenant and remainderman of part of the stock, as capital and not as income.[36]

Where certain shares of stock were held in a company which increased its capital stock, giving its stockholders the right to subscribe for the new stock on certain conditions, and the option

(33) Earp's Appeal, 28 Pa., 368 (1857); Maulsby's Estate, 32 Pa. C. C., 153 (1906); Wright's Estate, 5 D. R., 345 (1896).

(34) Wiltbank's Appeal, 64 Pa., 256 (1870). See, however, Biddle's Appeal, 99 Pa., 278 (1882); Vinton's Appeal, 99 Pa., 434 (1882).

(35) Eisner's Estate. Eisner's Appeal, 175 Pa., 143 (1896).

(36) Vinton's Appeal, 99 Pa., 434 (1882); Graham's Estate, 198 Pa., 216 (1901).

to subscribe was sold, held, that the proceeds of the option was capital and not income.[37]

The proceeds of a right to subscribe for an increase of capital stock are capital and not income, and hence go to the remainderman, and not to the life tenant of stocks from the possession of which the right to subscribe to the increase of capital stock arose. "The present case differs from Earp's Appeal, 28 Pa., 368, in this, that the corporation had made no distribution of profits in the shape of stock or otherwise, other than its regular dividends. In Earp's Appeal the stockholder paid the company nothing for the new stock. It was paid for wholly out of the profits. Here the stock of the company was merely doubled in amount, the stockholders paying therefor its par value in cash. Wiltbank's Appeal, 64 Pa., 256, was a different case. . . . . The trustees sold the new stock and realized an actual profit which was carried to the trust account. . . . . There had been no serious diminution of the value of the old stock caused by the new issue. Here there was the case of the capital remaining unimpaired for the remainderman, and an actual realized profit by the sale of the new shares. Such profit was properly awarded to the life tenant." [38]

When a testator owning stock has bequeathed the income of his estate to one person for life, with a gift of the principal to another in remainder, a dividend upon the stock out of the proceeds of a sale of land, made after his death, the association still retaining its capital unimpaired, is income within the terms of the will.[39]

Where the stock of a corporation is bequeathed in trust for the use of a beneficiary for life with a remainder over, surplus profit accumulated during the testator's life, but not divided until after his death, belongs to the corpus of his estate, while dividends of earnings made after his death, whether in cash, scrip or stock, are income and payable to the life tenant. Wherefore, if the corporation after the testator's death, declare a stock dividend, representing earnings capitalized in his lifetime, the new stock so issued to the trustees under the will will be principal and not a

(37) Biddle's Appeal, 99 Pa., 278 (1882).

(38) Moss' Appeal, 83 Pa., 264 (1877); Condy's Estate, 10 W. N. C., 319 (1881); Paxson's Estate, 16 D. R., 565 (1907).

(39) Oliver's Estate, 136 Pa., 43 (1890); 26 W. N. C., 392; 7 Pa. C. C., 3 (1889).

part of the income to which the life tenant is entitled, even though the market value of the original shares be unaffected by the new issue.[40]

The dividends declared by a real estate company derived from the sale of real estate, the capital remaining unimpaired, are income and go to the life tenant. The price realized from the sale of a privilege incident to the ownership of stock, to subscribe to the bonds of another corporation whose stock is to be given as a bonus to the subscriber, is not income, but goes to the remainderman. Such an arrangement is characterized as a gross violation of law.[41]

The property of a corporation, after payment of liabilities, belongs to the existing stockholders, who, therefore, are entitled to any and all enhancements of its original value, and such enhancements belong not to the tenant for life but to the remainderman. The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but must be treated as capital, and added to the trust fund for the benefit of the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration; in either event the increase goes to the corpus. Where a corporation sells part of its franchise and property and distributes the proceeds of the same as a dividend among its stockholders, such dividend, as between life tenant and remainderman, is not income but capital. Where a right is given to the stockholders of one corporation to purchase the stock of another, the price brought by the sale of the subscription right is a profit incident to the ownership of the stock of the first corporation, and is income and not principal, because "it is clear that the stock of neither of these companies could be reduced in value or affected by the increase of the number of shareholders" of the company whose shares are to be subscribed to.[42]

A person having a life estate in the stock of a corporation is not entitled to the enhanced value of the stock due to undivided profits, which enhanced value belongs to the remainderman. Where

(40) Smith's Estate, 140 Pa., 344 (1891); 27 W. N. C., 420; 26 Id., 231.
(41) Thompson's Estate, 153 Pa., 332 (1893).
(42) Eisner's Estate. Eisner's Appeal, 175 Pa., 143 (1896).

dividends are declared on the surplus earnings the legatee for life is entitled only to the proportion of such earnings which accrued subsequently to the testator's death.[43]

"A profit accruing from the ownership of stock not lessening or impairing the intrinsic value of the principal invested, either by taking from the corporation any of its assets, creating any obligation binding upon it, introducing new stockholders having the right to participate in the distribution of corporate property in the event of dissolution, or in any other way, would seem logically to belong to the person entitled to income—and not to those to whom, at the expiration of his estate, the principal is to go by way of remainder. Such a profit is that which arises when the right is given to stockholders to subscribe to the stock of a newly created company, not in any manner belonging to or forming part of the corporation whose stock is already held. That the newly created company intends to become the lessee of the company already existing and that the right to subscribe is offered to stockholders as part of the inducement to their consent to the lease, does not prove or tend to prove, that it is to be regarded as capital." [44]

Stock dividends out of surplus income are to be apportioned between the life tenant and the remainderman in the proportion which the amount of said income accumulated at the beginning of the life estate bears to the total amount of such surplus when the dividend was declared, whether the dividend consumed the entire amount of such surplus or not. The proportion of the dividend represented by the amount of surplus accumulated during the life estate goes to the life tenant, the remainder to the remainderman.[45]

A profit on the sale of shares of stock belonging to a decedent's estate is a part of the principal of the estate, but the gain on a sale of stock acquired under an option to subscribe for shares of stock is income.[46]

Where a corporation expends a portion of its income applicable

(43) Connolly's Estate, 198 Pa., 137 (1901); Turpin's Estate, 5 Pa. C. C., 288 (1888).

(44) Wright's Estate, 24 Pa. C. C., 376 (1900); 9 D. R., 447.

(45) Morrell's Estate, 25 Pa. C. C., 281 (1901); 10 D. R., 319; Maulsby's Estate, 14 D. R., 329 (1905); Elton's Estate, 1 D. R., 458 (1892). See, however, Crosman's Estate, 14 D. R., 40 (1904).

(46) Kemble's Estate, 10 D. R., 320 (1901).

to dividends in the purchase of real estate and permanent improvements, and subsequently issues to its stockholders obligations designated as dividend obligations, equal to the amount so invested, such obligations are scrip dividends, and as such are the property of a life tenant rather than the remainderman, under a deed of trust directing that all dividends on the stock described in the deed, whether in money or scrip of any description are to go to the life tenant.[46*]

267. Legacies of Shares of Stock.

A legacy of shares of stock is not specific without a description of them as standing in the name of the testator, or as "my stock," even though the number of shares is an odd one corresponding exactly to the number owned by the testator. In the case of a general legacy of stock, dividends on the stock owned by the testator accruing before its delivery to the legatee belongs to the residuary legatee.[47]

In case of specific legacies of stock, dividends declared thereon after the death of the testator go to the legatee.[48]

268. Assignment of Stock to a Corporation.

An assignment of stock to a corporation as collateral security for a loan divests the title of the assignor so far as to prevent a sale of it under a fi. fa. against him.[49] In such case execution must be by attachment under the Act of June 16, 1836, P. L., 767, Sec. 32, authorizing an attachment of stock standing in any other name than that of defendant, and such attachment should not issue without the filing of the affidavit and recognizance required by the act.[50]

269. Forfeiture of Shares for Non-Payment of Calls—Sales of Shares Therefor.

Sec. 7 of the General Railroad Act of February 19, 1849, P. L., 79, provides for the forfeiture of shares of stock for non-payment of calls, and similar provisions were contained in other early acts, and are yet contained in the by-laws of some corpora-

(46*) Robinson's Trust, 218 Pa., 481 (1907).
(47) Yerke's Estate, 22 Pa. C. C., 263 (1899).
(48) Queen's Estate, 11 D. R., 301 (1902).
(49) Early & Lane's Appeal, 89 Pa., 411 (1879).
(50) Eby *v.* Guest, 8 W. N. C., 467 (1880).

tions and associations. Under these provisions it has been held that a power given to a corporation to forfeit stock must be strictly pursued, and if any restrictions have been disregarded the forfeiture will be declared invalid, but no notice of the contemplated forfeiture is necessary unless expressly required. Equity does not relieve against a valid forfeiture of stock. A stockholder being a member of a corporation must be presumed to know the terms of his subscription. Creditors have a standing to object to a forfeiture of stock and to invoke the aid of equity to prevent it or set it aside.[51]

Sec. 11 of the Act of April 29, 1874, as amended by the Act of May 9, 1889, P. L., 180, provides for the sale of a sufficient number of shares to pay the indebtedness of the shareholder on account of his stock, after he has been in arrears in the payment of calls for six months, in the manner provided by Cl. 2 of Sec. 39, of said Act of 1874. The provisions in said clause are taken from Secs. 17 and 18 of the Act of July 18, 1863, P. L., 1864, p. 1102.

Where the by-laws of a corporation provide that the corporation may levy an assessment upon the stock, and, in default of payment, forfeit the stock, the corporation cannot bring assumpsit against a stockholder for the amount of the assessment levied upon his stock,[52] and it was held that an action of assumpsit would not lie to recover an assessment upon fully paid stock, under the Act of April 29, 1874, Sec. 39 of said act providing an exclusive remedy: forfeiture and sale of the stock.[53]

270. Treasury Stock.

Inasmuch as the stockholders may fix any valuation they please on property taken by them for stock, so long as there is not a gross and obvious overvaluation,[54] and as the stock issued for such property is full-paid, and the creditors of the company can-

(51) Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869); Morris *v.* Metaline Land Co., 164 Pa., 326 (1894); Belmont Park Assn. *v.* Toller, 6 Pa. C. C., 266 (1888).

(52) Belmont Park Assn. *v.* Zoller, 22 W. N. C., 545 (1888); Allegheny Valley Camp Meeting Assn. *v.* Kountz, 29 Pa. Super. Ct., 110 (1905).

(53) Richboro Dairymen's Assn. *v.* Ryan, 16 Wl. N. C., 383 (1885).

(54) Carr *v.* LeFevre, 27 Pa., 413; Coit *v.* Gold Amalgamating Co., 15 Phila., 496 (1882); Same parties, 119 U. S., 343 (1886); Op. U. S. Cir. Ct., 14 Fed. Rep., 12 (1882); Cock *v.* Bailey, 146 Pa., 328 (1891). See Danville, Hazleton & Wilkesbarre R. R. Co. *v.* Kase, 39 Atl. Rep., 301 (1898).

not compel the holders to pay on account thereof any difference between the par value of the stock and the actual value of the property conveyed on account of the same, the practice exists of issuing stock for property, a portion of which is contributed or donated to the corporation which can then sell it at any price which it may be able to get for the same, for the purpose of raising working capital. Such a proceeding is legitimate[55] and the stock so issued is known as treasury stock.

271. Owning Shares of Other Corporations—Guaranteeing Stock of Other Corporations.[56]

272. Stock Bonus.

A stock subscription is not invalid because a bonus of stock is to be given with the stock subscribed for, when such bonus stock does not come from the company, but from a person to whom it had been issued in payment of patent rights assigned to the company.[57]

(55) American Tube, etc., Co. *v.* Hays, 165 Pa., 489 (1895); Finletter *v.* Acetylene Lt., Ht. & Pr. Co., 215 Pa., 86 (1906); Cook on Corpns., Sec. 46. See Marles Carved Moulding Co. *v.* Stulb, 215 Pa., 91 (1906).

(56) See Sec. 421.

(57) Marles Carved Moulding Co. *v.* Stulb, 215 Pa., 91 (1906).

CHAPTER XV.

SUBSCRIPTIONS TO CAPITAL STOCK.

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273. Acts Governing Subscriptions to Capital Stock.

The capital stock of every such corporation that has or requires capital stock, shall consist of not more than one million dollars, except companies incorporated for the purpose of supplying the public with water, whose capital stock shall not exceed two million dollars,[1] and shall be divided into shares of not more than one hundred dollars each; and all subscriptions to the capital stock shall be paid in such instalments and at such times as the directors may require, and if default be made in any payment the person or persons in default shall be liable to pay, in addition to the amount so called for and unpaid, at the rate of one-half of one per centum per month for the delay of such payment,[2] and the directors may cause suit to be brought for the recovery of the amount due, together with a penalty of one-half of one per centum per month, as aforesaid, or the directors may cause the stock to be sold in the manner provided in Cl. 2 of Sec. 39 of this act;[3] and no stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any instalments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting. The shares of the capital stock of every such company may be transferred on the books of the company, in person or by attorney, subject to such regulations as the by-laws may prescribe; but the provisions of this section shall not apply to cor-

(1) The Act of May 3, 1899, Sec. 2, P. L., 190, permits the capital stock of any corporation to be increased to any necessary amount. See Sec. 243.

(2) When no call for the payment of subscriptions has been made, this penalty is not payable, and interest on the amount of a subscription can be charged only from the date of the decree. Bair & Gazzam *v.* Wilson, 15 Pa. Super. Ct., 131 (1900).

(3) Clause 2 of Sec. 39, Act of April 29, 1874, is as follows:

"That if the proprietor of any share neglect to pay a sum duly assessed thereon, for the space of thirty days after the time appointed for payment, the treasurer of the company may sell by public auction a sufficient number of the shares to pay all assessments then due, with necessary and incidental charges thereon. The secretary shall give notice of the time and place appointed for such sale, and of the sum on each share, by advertising the same three weeks successively before the sale in some newspaper published in said county; and a deed of the share so sold made by the treasurer and acknowledged before a justice of the peace and recorded by the clerk, who shall transfer said shares to the purchaser, who shall be entitled to a certificate therefor."

porations in which, by this act, different and other rules and provisions are enacted for their regulation and government.[3*]

The Acts of May 29, 1885, P. L., 29, and March 22, 1887, P. L., 8, providing for the incorporation of natural gas and traction companies, respectively, contain no provisions relative to subscriptions to the stock of such companies. The Act of May 14, 1889, P. L., 211, providing for the incorporation of street railway companies, following the provisions of Sec. 8 of the General Railroad Act of February 19, 1849, provides by its seventh section that calls shall not be made for an amount exceeding five dollars per share within any period of thirty days, of which public notice shall be given by advertisement, and gives the directors the option of forfeiting shares on which calls remain unpaid for the period of six months. The monthly forfeit for delay of payment of calls is one per centum. In other respects the section follows the provisions of the Act of 1874, as amended.

274. Nature of Contract.

Prior to the incorporation of a proposed company there can hardly be said to be a contract of subscription. A contract may be so drawn as to make the subscribers contract with each other to take stock in the corporation when organized, but if the subscriber should withdraw his subscription at any time before the articles of association are filed in the office of the Secretary of the Commonwealth, as he may do,[4] it is evident that he could not be held upon his subscription, but would be liable, only, to his co-subscribers for whatever damages they might have incurred through the withdrawal of his subscription. Such subscription is, rather, in the nature of a continuing offer, which takes effect as soon as

(3*) Section 11, Act April 29, 1874, P. L., 79, as amended by Act of May 9, 1889, P. L., 180. The provision that "this section shall not apply to corporations in which, by this act, different and other rules and provisions are enacted for their regulation and government," relates to building and loan associations, subscriptions to the capital stock of which are governed by Clause 2, Sec. 37, of the Act of 1874, and to mechanical, mining, quarrying, manufacturing and similar corporations, subscriptions to which are governed by Clause 2 of Sec. 39 of said act, given in the preceding note. The latter provision, as is the case with the greater part of Sec. 39, is taken from the Act of July 18, 1863.

(4) Auburn Bolt Works *v.* Shultz, 143 Pa., 256 (1891); Muncy Traction Engine Co. v. De La Green, 143 Pa., 269 (1888). See Garrett *v.* Dillsburg etc. R. R. Co., 78 Pa., 465 (1875).

there is a corporation *in esse* capable of accepting it. In Pennsylvania, upon what grounds it is not easy to see, it is held that the contract becomes irrevocable, or that the offer is accepted, when the articles of association are ready for filing, when there is, as yet, no corporation in existence capable of accepting the offer.

"When an agreement of subscription to stock declares the purpose to form a corporation under existing laws, each subscriber contracts with his associates, in consideration of similar contracts by them to contribute to the common fund, the amount subscribed by him, and these mutual promises form a mutual and valid consideration. This contract cannot be enforced by the individuals composing the association, for the duties are to the association, and the first duty is to organize the corporation. When the company contemplated by the subscription paper has become duly organized, it becomes the legal representative of all the subscribers to the stock and invested with the power to enforce the contract. The entire scheme prior to the organization of the association is experimental and inchoate, and subscriptions to the stock have the nature of mere proposals, and, during that period, may be withdrawn. The association cannot be said to be organized until all preliminaries have been gone through with and it is ready to apply for a charter. It has been held under our legislation that the organization of the corporation becomes complete when it is ready to file the proper certificate and application for a charter in the office of the Secretary of the Commonwealth. Upon the filing of the certificate the obligation of the subscriber becomes final: Garrett *v.* R. R. Co., 78 Pa. 465 (1875); Muncy Co. *v.* Green, 143 Pa., 269 (1891); Auburn Bolt Works *v.* Shultz, 143 Pa., 256 (1888)."[5]

It is evident that the contract between the subscribers, *inter sese,* is a contract to subscribe, not a contract of subscription, and that there cannot be a contract of subscription until there is in being a corporation with which the contract may be made. As letters patent are granted as a matter of course under the general incorporation laws, the decisions above cited may be based upon the ground that the proposed corporation is constructively incorporated as soon as the articles of association are ready for filing.

As soon as the proposed corporation is incorporated it will be

(5) Jeanette Bottle Works *v.* Schall, 13 Pa. Super. Ct., 96 (1900).

presumed to accept the subscriptions made before incorporation and may sue to recover the amount of the same.[6]

Subscriptions to the stock of a company after incorporation are like other contracts. There must be an offer to subscribe and an acceptance of the subscription, but such acceptance need not be express, but may be implied from the conduct of the corporation in entering the subscription on its books, demanding or retaining the amount thereof or otherwise acting upon it.[7]

275. Distinction Between a Subscription Agreement and a Contract for Purchase of Stock—Sale of Stock by a Corporation at Less Than Par.

"It seems to us that there is a distinction between a subscription agreement and a contract for the purchase of stock. Subscribers, as generally understood, are those, who, upon the formation of a corporation, agree mutually to take and pay for shares of capital stock, and in the absence of any special provision, they agree with each other to pay therefor the par value of the stock. But after the organization is completed, as in this case, an individual may make an agreement to purchase stock from the corporation at any stipulated price, in which case the contract is binding on the corporation as well as on the purchaser."[7*]

Where a person agrees to purchase the preferred stock of a corporation, but fails to carry out his contract, the measure of damages is the difference between the amount of the sum agreed upon, and the amount actually paid by the purchaser or procured to be paid through his efforts for the preferred stock.[7**]

276. Form of Subscriptions.

As a general rule, subscriptions for stock must, in order to bind the parties, be made in the prescribed form and must be in writing, but parol subscriptions have been held valid in cases where owing to the circumstances involved the subscribers are estopped from setting up the informality of their subscriptions. Thus,

(6) Edinboro Academy *v.* Robinson, 37 Pa., 210 (1860); Steamship Co. *v.* Murphy, 6 Phila., 224 (1867); Shober *v.* Lancaster Park Assn., 68 Pa., 429 (1871).

(7) Pgh. & Connellsville R. Co. *v.* Plummer, 37 Pa., 413 (1860); Greer *v.* Chartiers Ry. Co., 96 Pa., 391.

(7*) McDowell *v.* Lindsay, 213 Pa., 591 (1906).

(7**) Person & Riegel Co. *v.* Lipps, 219 Pa., 99 (1907).

where a subscription was made by an agent of the company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with the knowledge of the subscription, and presumably knew that without such knowledge the loan would have been invalid and contrary to law, held, that neither party would be permitted to deny the validity of such subscription.[8] And in a recent case it has been held, generally, that a parol subscription to stock, followed by acts amounting to a ratification, is valid, upon the ground of estoppel.[9]

A subscription is valid where the subscriber wrote the par value of the shares subscribed for by him, in the subscription paper, but did not fill in the number of the shares, which was done by some one else.[10]

In a suit against an alleged subscriber to the stock of a railroad company, incorporated under the Act of 1868, it appeared that the defendant had signed a paper to which no "heading" was prefixed; that he was told that the "heading" which was, in fact, the articles of association, would be submitted to him thereafter, when he would be asked to subscribe; there was nothing said about affixing the signed paper to any heading, but the articles of association were afterwards prefixed to the signed paper without being submitted to defendant. Held, that there was no compliance with the Act of 1868, and that unless defendant's subscription was attached to the articles of association with his own assent it was of no force.[11]

A subscription in the following form: "We, the undersigned, do hereby subscribe to the capital stock of the South West Pennsylvania Fair, the number of shares of the par value of twenty-five ($25.00) dollars set opposite our names," etc., was held, not to amount to a subscription because the paper expresses no intention

(8) Shellenberger *v.* Patterson, 168 Pa., 30 (1895).

(9) Perkiomen Brick Co. *v.* Dyer, 187 Pa., 470 (1898); 43 W. N. C., 98. See Bucher *v.* D. & M. R. Co., 76 Pa., 306. It was held in Pgh. & Steubenville R. R. Co. *v.* Gazzam, 32 Pa., 340 (1858) that subscriptions to stock must be in writing and cannot be established by parol evidence, unless there is some proof of an original written subscription, and of the loss of the book or paper containing the same. See Com. *v.* Patterson, 158 Pa., 476 (1893).

(10) Columbus Land Co. *v.* McNally, 172 Pa., 158 (1895).

(11) Bucher *v.* Dillsburg & Mechanicsburg R. R. Co., 76 Pa., 306 (1874).

on the part of the subscribers to form a corporation, the purpose not being expressed, except in the name, when the alleged subscriber took no part in the incorporation, and there was no proof that he took part in the affairs of the corporation, and no other subscriber was shown to have signed on the faith of the defendant's name.[12]

Where the subscription books of a contemplated enterprise were headed as follows: "We, the undersigned, agree to form into a stock company for the purpose of erecting a nail factory, each share of stock to be $50, and we agree to take the amount of stock subscribed to our several names," it was held that the agreement signed by the parties did not contemplate incorporation, and was no more than a subscription to an unincorporated association which was but a partnership.[13]

Where the owner of a store building offers to lease the same to a trading corporation, and as an inducement to the company to take the lease offers to purchase a large amount of the preferred stock of the company, and such offer is accepted by the corporation, the contract is based upon a sufficient consideration and is not lacking in mutuality.[13*]

277. An "Agreement to Subscribe" Amounts to a Subscription.

An agreement to subscribe and pay for stock amounts to a valid subscription.[14]

278. Agreement that Another Shall Subscribe.

Where A agreed that in a certain event B would subscribe for a certain amount of stock in a corporation, for which A promised to be responsible, held, that the corporation might recover from A in an action of assumpsit, the measure of damages being the difference between the value of the stock at the time of the trial and the amount which the defendant had agreed that B should pay for it.[15]

(12) South West Penna. Fair Assn. *v.* Greer, 11 Pa. Super. Ct., 103 (1899).

(13) Dalmatia Nail & Iron Co. *v.* Byerly, 1 Northumb., 63 (1887).

(13*) Person & Riegel Co. *v.* Lipps, 219 Pa., 99 (1907).

(14) Jeanette Bottle Wks. *v.* Schall, 13 Pa. Super. Ct., 96 (1900).

(15) Rhey *v.* Ebensburg & Susq. Plk. Rd. Co., 27 Pa., 261 (1856).

279. Agreement to Take Stock From Subscriber or to Pay Calls for Him if He Require.

Where defendant agrees with the plaintiffs that if they will subscribe to certain stock and cannot pay the subscription therefor and they do not want it, he will take it off their hands, he is responsible for any loss occasioned by his failing to comply with his agreement. The measure of damages is, the difference between what they paid for the stock and what they sold it for.[16] Such an agreement is based upon a sufficient consideration.[17]

In an action against the promoter of a corporation to recover the amount of a stock subscription paid by the plaintiff as a subscriber, the plaintiff claimed that when the subscription was made the defendant agreed that the money should be returned to the plaintiff if he were dissatisfied. The plaintiff averred that under this agreement he had rescinded the contract. The defendant offered proof tending to show that the plaintiff had directed him to sell the stock at a price named, had given him a proxy to vote his stock and had attended a stockholders' meeting and participated therein. Held, that the case was for the jury, with instructions that the facts alleged by defendant were *prima facie* acts of ownership inconsistent with the demand for recission, and that the jury might infer from them an acquiescence in defendant's refusal and an abandonment or waiver of such demand.[18]

Where the vendor of stock agrees, as an inducement to the purchase, that he will pay assessments thereon when called, the corporation cannot maintain an action therefor against such vendor.[18*]

280. Subscriptions in the Name of Another Person.

A subscription to the stock of a corporation in the name of another, without precedent authority, is an act capable of ratification. A letter of attorney executed in the name of the person in whose name the subscription was made, constituting the attorney his proxy, at a meeting of the company, is evidence of a ratification to go to the jury.[19] And where a subscription was made by a director of the company, without authority, in the name of

(16) Herd *v.* Thompson, 149 Pa., 434 (1892).
(17) McClymonds *v.* Stewart, 2 Pa. Super. Ct., 310 (1896).
(18) Jessop *v.* Ivory, 158 Pa., 71 (1893).
(18*) Crown Slate Co. *v.* Allen, 199 Pa., 239 (1901).
(19) McCully *v.* Pgh. & Connellsville R. R. Co, 32 Pa., 25 (1858).

and for an original stockholder, for additional shares of stock, and such stockholder did not attempt to repudiate the subscription during seven years, held, that this was evidence of a ratification proper to be submitted to the jury.[20]

S authorized M, in writing, to subscribe for five shares and to pay the first instalment thereon with $25, which he gave him, at the same time directing him, verbally, to enter the subscription in his (S's) name. M subscribed for a large number of shares in his own name, paying the first instalment on five of them with the said $25. When all the shares so subscribed for were fully paid, M transferred five of them to S's name, and tendered him a certificate therefor, which he refused. S knew of M's action, but there was no direct evidence of a ratification or repudiation of such action. In an action by M to recover the amount of instalments paid by him, held, that M was bound to make the subscription in S's name and failing to do so could not recover; that the question whether S ratified the subscription should have been left to the jury, and that it was error to charge that S was bound to demand a transfer of the stock to his own name as soon as he heard that the subscription had been made in M's name.[21]

281. Mistake in Making Subscriptions.

"It is unquestionably true that where one is induced to make a subscription to the capital stock of a company by fraudulent representations or false statements of an agent of the company or commissioners appointed to obtain subscriptions, the contract may be avoided by the subscriber, but a mere promise by the agent to procure stock for the subscriber in another company will not have this effect, nor will a mistaken estimate of the probable cost of the improvement." [22]

282. Who May Subscribe.

A subscribed to certain shares of increased capital stock of a corporation upon condition that the subscription should not become binding unless the full amount of the increase was subscribed. Among the subscriptions were two by married women,

(20) Phila., Wil. & B. R. R. Co. *v.* Cowell, 28 Pa., 329 (1857).

(21) Schrack *v.* McKnight, 84 Pa., 27 (1877). But see Gilpin *v.* Howell, 5 Pa., 41 (1846). See Section 283.

(22) Crossman *v.* Penrose Ferry Bridge Co., 26 Pa., 69 (1856).

which were void and were never paid. Held, that as to one who did not, by any act, waive this defect, the condition had not been complied with. Otherwise, as to those subscribing subsequently to the married women and with knowledge thereof.[23]

283. Subscriptions Made Through Agents.

F, a director of a railroad company, to relieve the company from embarrassment, subscribed for certain shares of stock thereof in the name of and for C, a large stockholder in the company, and so advised C, then residing abroad, who made no reply to F or to the company. The dividends on the stock originally held by C were thenceforth applied in payment of the stock so subscribed for. Seven years after said subscription and notification thereof to C, he sued for the dividends declared on the original stock, and alleged that the subscription was unauthorized. Held, that the silence of C for so long a period after notice of the subscription was evidence of his ratification of the subscription to be submitted to the jury.[24]

An agent accepted shares of stock in a corporation, with which he had been doing business, subject to the approval of his principal, the payment therefor to be taken out in the purchase of goods from such principal. The principal disapproved of the contract, but the agent neglected to so notify the company, and continued to sell them goods as before. In an action by the principal against the company, to recover the price of the goods thus sold, held, that the neglect of the agent to notify the company of his principal's disapproval of the contract did not imply a ratification of it by the principal.[25]

It was held no defense to an action against the stockholders in a corporation formed under the Manufacturing Companies Act of 1849, brought against them individually, that they had paid up all the stock subscribed for by them, and that the stock upon which there was an unpaid balance had been subscribed for by them as the agents of the corporation, which was to hold and sell such stock at its leisure for its benefit, because the certificate showing that the original stock had been subscribed by and for the de-

(23) Hahn's Appeal, 7 Atl., 482; Cornell & Michler's Appeal, 114 Pa., 153 (1886); 18 W. N. C., 289.

(24) Phila., Wil. & Balto. R. R. Co. *v.* Cowell, 28 Pa., 329 (1857).

(25) Merrick Thread Co. *v.* Phila. Shoe Mfg. Co., 115 Pa., 314 (1886).

fendants is conclusive between them and the public, and cannot be contradicted by any undisclosed arrangements between the stockholders and the corporation.[26]

In an action to recover the amount of a subscription to the capital stock of a brewing company, there was evidence tending to show that the defendant subscribed for stock for himself, but signed his wife's name, not being certain that, as a wholesale liquor dealer, he had a right to subscribe himself. Held, that such evidence was competent, and that whether defendant subscribed for his own benefit, or not, was for the jury.[27]

284. Subscriptions by Partners.

One partner cannot make himself the agent of his firm to subscribe for the stock of a railroad company—the building of railroads not being within the scope of the partnership—and, to enable a corporation to recover against a firm under such circumstances, the plaintiff must prove the assent of all the partners. Where one partner subscribes in the name of the firm to the stock of a corporation, if the other partners have knowledge of the subscription and of payments thereon by the firm, and do not dissent, it is strong evidence of a ratification of the subscription.[28] Where a member of a firm subscribed for stock, and the firm was accepted in lieu of himself before any payment on account of the subscription, held, that the firm was liable on the ground of the substitution of the firm, in place of the member thereof, by an agreement to which all parties assented.[29]

285. Subscriptions by Commissioners.

Where commissioners were appointed under the provisions of an act of assembly to receive subscriptions to a street railway company, held, that the right of such commissioners to take stock was no greater than that of the public generally, and that the policy of the law would be as much violated by permitting them to

(26) Allibone et al. *v.* Hager et al., 46 Pa., 48 (1863).

(27) Shields *v.* Casey, 155 Pa., 253 (1893).

(28) Livingston *v.* Pittsburgh & Steubenville R. R. Co., 2 Grant, 219 (1858).

(29) Weinman *v.* Wilkinsburg & E. L. Pass. Ry. Co., 118 Pa., 192 (1888); 45 Leg. Int., 176.

appropriate the whole capital stock, to the exclusion of others, as by allowing that to be done by one who is not a commissioner.[30]

286. Revocation of Subscriptions.

As has already been seen,[31] a subscription to the stock of a proposed corporation may be revoked at any time prior to the date when the articles of association are ready for filing in the office of the Secretary of the Commonwealth, but thereafter it is irrevocable, and if a subscriber allow his name on the subscription list he may not afterward defend in an action to recover the amount of his subscription, on the ground that he called on the committee on subscriptions and demanded that his name be stricken from the list which was not done.[31*] Such a contract of subscription might, undoubtedly, be drawn so as to make the subscribers contract with each other, individually, to take stock in a corporation, but it is evident that any subscriber could, nevertheless, withdraw his subscription at any time prior to the time when the articles of association were ready for filing, being liable, in such case, only for whatever damages the other subscribers might incur because of such withdrawal.[32]

287. Notice of Revocation.

Where the subscriber to the stock of a proposed corporation sent a letter to the chairman of the projectors, at a meeting thereof held prior to the preliminary organization, withdrawing his subscription, which letter was read at said meeting, it was held that this was a sufficient notice of the withdrawal of the subscription.[33]

288. Subscriptions Received by Commissioners.

Where commissioners accepted subscriptions for stock without the payment of the amount per share required to be paid by the act providing for the incorporation of the proposed company, such subscriptions were held to be void, and that the corporation could not afterwards recover the amount so required to be paid.[34] But where the subscriber was one of the commis-

(30) Brower *v.* Second & Third Sts. Pass. Ry. Co., 3 Phila., 161 (1858).
(31) See Section 274.
(31*) Keeley Stove Co. *v.* Betz, 1 Lanc. L. R., 145 (1883).
(32) Clark & Marshall's Private Corpns., Sec. 443.
(33) Muncy Traction Engine Co. *v.* De La Green, 143 Pa., 269 (1891).
(34) Hibernia Tpk. Road Co. *v.* Henderson, 8 S. & R., 219 (1822).

sioners, it was held that he was estopped from setting up that he had not paid the said required amount;[35] and a commissioner is estopped, generally, from denying matters set forth in the certificate made by him and the other commissioners to the Governor, as required by law.[36] If, however, a person subscribing, without payment of the required amount at the time of subscription, subsequently exercises the rights of a stockholder by voting for managers, he will be estopped from denying the validity of his contract.[37] Otherwise, where he does not exercise such rights.[38]

289. Lapse of Subscriptions.

Apparently the death of a subscriber to the stock of a proposed corporation, before the articles of association are ready for filing, revokes the subscription.[38]

290. Subscriptions Procured Through Misrepresentation or Fraud.

"A contract to take and pay for stock in a corporation, made in consequence of a fraudulent prospectus, is voidable only, and not void, and can only be avoided subject to the rights of creditors, where there is a winding up order or a voluntary winding up: Bispham's Equity, Sec. 472; 2 Addison Cont., 8th Ed., 774; Cook on Stock, etc., Secs. 151 to 154. The intervening rights of creditors and other stockholders call for prompt action on the part of a subscriber who seeks to avoid his liability on the ground of fraud: Bispham's Equity, Sec. 154." [39]

"If the defendants were guilty of the alleged fraud, the plaintiffs had the undoubted right to rescind the contract, and upon a tender of the stocks, to demand back the price paid for them. But it was their duty to do it within a reasonable time. They were not at liberty to await the result of the experiments the companies were making . . . . and to rescind their contract

(35) Grayble *v.* York & Gettysburg Tpk. Co., 10 S. & R., 269 (1822).

(36) Barrington *v.* Pitts. & Steubenville R. R. Co., 34 Pa., 358 (1859); Phipps *v.* Jones, 20 Pa., 260 (1853). This was the case of an unincorporated association, but the reasoning therein would seem equally applicable to corporations.

(37) Clark *v.* Monon. Nav. Co., 10 Watts, 364 (1840); Erie & Waterford Plank Rd. Co. *v.* Brown, 25 Pa., 156 (1855).

(38) Boyd *v.* Peach Bottom Ry. Co., 90 Pa., 169 (1879).

(39) Howard *v.* Turner, 155 Pa., 349 (1893.)

after their efforts had proved fruitless. . . . . If they unduly delayed to return them the stocks and demand back the price, they affirmed the validity of the contract. . . . . What is reasonable time or undue delay, when the facts are not disputed, is, as is well settled, a question of law to be determined by the court." [40]

A subscriber to stock had notice of fraud in the procuring of his subscription, in September, 1896. He gave no notice of election to rescind, paid one instalment and raised no question until October, 1897. Held, that defendant having taken his chance of a rise in the market price of the highly speculative stock, for one year, must abide by his election.[41]

An affidavit of defense is insufficient when, alleging mere expressions of opinion, it fails to aver a distinct statement of material fact known to the solicitor and unknown to the subscriber, which, if false, would justify a recission of the contract.[42]

Where a contract of subscription is absolute, a defendant must, in order to prevent judgment, do more than simply state in his affidavit of defense, in general terms, that false and fraudulent representations were made. He must set forth what the false representations were, and state wherein they were false, and that he was deceived.[43]

Omission to repudiate a fraudulent sale of stock within a reasonable time is evidence of an election to affirm the contract. What is reasonable time is a question of law.[44]

An affidavit of defense setting up that defendant was induced by the misrepresentations of a co-subscriber to sign his name to the articles of association of a railroad company without reading them for himself, is insufficient, in an action by the railroad company, to enforce subscription to the stock of the company.[45]

The principle of the cases would seem to be this: That where

(40) Leaming *v.* Wise, 73 Pa., 173 (1873). In Lare *v.* Westmoreland Specialty Co., 155 Pa., 33 (1893) the Court below held that "If the defendant was deceived and defrauded he was not bound to rescind. He might have retained the stock and recovered such damages as the evidence showed him to have suffered."

(41) Acetylene Lt., Ht. & Pr. Co. *v.* Smith, 10 Pa. Super. Ct., 61 (1899).

(42) Phila. Bourse *v.* Downing, 6 Pa. Super. Ct., 590 (1898).

(43) Acetylene Lt., Ht. & Pr. Co. *v.* Smith, 10 Pa. Super. Ct., 61 (1899). See Same *v.* Beck, 6 Pa. Super. Ct., 584 (1898).

(44) Acetylene Lt., Ht. & Pr. Co. *v.* Smith, 10 Pa. Super. Ct., 61 (1899).

(45) Path Valley R. R. Co. *v.* John Brinley, 15 Pa. C. C., 339 (1894).

representations made by an agent to obtain subscriptions are a part of a scheme of fraud participated in by the officers of a corporation authorized to manage its affairs; or where the representations are such as the agent may reasonably be presumed, by the subscriber, to have the authority of the corporation to make, such representations may be given in evidence to show the fraud by means of which the subscriptions were procured. But when there is no reasonable presumption of authority, and no actual authority to make such representations, the corporators should not be prejudiced by the unauthorized act of the agent. Hence, when the representation of the agent is contrary to the interests and duty of the corporation, as that he will release or has authority to release the subscription he is taking, it is not a reasonable presumption that he has such authority, and a subscriber on such terms would be *particeps criminis* and held to all the responsibilities of a *bona fide* subscriber. This is the very point decided in Robinson *v.* R. R. Co., 8 Casey (32 Pa.) 334.[46]

Subscriptions to the capital stock of a corporation induced by fraudulent or false representations of an agent of the company, or a commissioner appointed to receive subscriptions, may be avoided by the subscriber, but a mere promise by the agent to secure stock for the subscriber in another company will not have this effect, nor will a mistaken estimate of the probable cost of the works of the company.[47]

When a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber by which he has sustained or might sustain injury, no action can be maintained against him by the corporation for the amount of his subscription, but where such subscriber has accepted the charter and by his own acts put it into operation, he cannot avail himself, as a defense, of the fact that a part of the stock was fictitious.[48]

Where a subscription was obtained by fraudulent representations of the directors of a company, and the subscriber became

(46) Custar *v.* Titusville Gas & Water Co., 63 Pa., 381 (1869). See Cass *v.* Pgh., Va. & Ch. Railway Co., 80 Pa., 31 (1875); Marles Carved Moulding Co. *v.* Stulb, 215 Pa., 91 (1906).

(47) Crossman *v.* Penrose Ferry Bridge Co., 26 Pa., 69 (1856).

(48) Centre & K. Tpk. Rd. Co. *v.* McConahy, 16 S. & R., 140 (1827); McConahy *v.* Centre & K. Tpk. Rd. Co., 1 P. & W., 426 (1830). See Graff *v.* Pgh. & Steubenville R. R. Co., 31 Pa., 489 (1858).

a director thereof and its secretary, and hence was conversant with its affairs, and he did not repudiate his subscription until eighteen months after the date of the same, when the company had become insolvent, held, that he could not then repudiate the subscription.[49] A person who has been induced by misrepresentations of the officers of a corporation to subscribe to its shares of stock may rescind the contract and, in an action of trespass for deceit, against the corporation and its officers, recover a judgment against all of the defendants for the amount which he paid for the stock.[50]

A subscriber to the capital stock of a corporation, at the solicitation of another subscriber, cannot maintain an action for deceit upon the ground that, although he was informed that a certain number of shares were to be issued to a patentee for the right to use his patents, an agreement between the patentee and the other subscribers to assign to them a portion of the stock issued to the patentee was kept secret from him, especially where no evidence is offered to show that such secret agreement was made prior to his subscription.[50*]

291. Conditional Subscriptions—Conditions Precedent and Subsequent.

Conditional subscriptions are made either upon conditions precedent or conditions subsequent. Sometimes the term, conditional subscriptions, is confined to subscriptions upon conditions precedent, while subscriptions upon conditions subsequent are designated as subscriptions upon special terms. The distinction between these two classes of conditional subscriptions is, that where the subscription is upon a condition precedent, such subscription does not take effect until the condition has been performed, until which time the subscriber is not a stockholder of the company and incurs none of the liabilities, and is entitled to none of the privileges and immunities, incident to the status of a stockholder. If the condition be a condition subsequent, the subscription takes effect at once, and is not avoided by the failure of the corporation to comply with the condition, but in such case the subscriber is

(49) Hilliard *v.* Allegheny Geometrical Wood Carving Co., 173 Pa., 1 (1896).

(50) Lare *v.* Westmoreland Specialty Co., 155 Pa., 33 (1893). See Sec. 263, Fraudulent Sales of Stock. See Sec. 252, Fraudulently Issued Stock.

(50*) Willock *v.* Dilworth, 204 Pa., 492 (1903).

entitled to recover from the company such damages as he may have incurred on account of such failure.[51] These terms have been little used, if at all, in Pennsylvania decisions upon the subject of conditional subscriptions, but the distinction which they designate has been uniformly recognized in such decisions. Whether a condition is precedent or subsequent is a question purely of intent, to be determined not only by considering the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required and the subject matter to which it relates.[52]

292. Conditional Subscriptions Made Before Incorporation.

"When subscriptions are made to the stock of a proposed public corporation, previous to and for the purpose of procuring a charter, any conditions annexed thereto, whether written or parol, are void." [53]

While most of the decisions to the effect that the conditions of conditional subscriptions made before incorporation are void relate to public or rather to quasi public corporations, the rule undoubtedly holds good as to purely private corporations.[54]

It seems, however, that, in the absence of fraud, an agreement made prior to incorporation that subscribers to the stock of a proposed corporation shall be permitted to pay for their stock by transferring to the company certain patent rights, may be ratified by the subsequent action of both the corporation and the subscribers, in execution of said agreement; [55] and it has been held

(51) Cook on Corporations, Secs. 77, 78; Clark & Marshall's Private Corporations, Secs. 46, 47.

(52) Bucksport etc. R. R. Co. *v.* Brewer, 67 Me. 295 (1877)

(53) McCarty *v.* Selinsgrove & N. Branch R. R. Co., 87 Pa., 332 (1878); Caley *v.* Phila. & Chest. Co. R. R. Co., 80 Pa., 363 (1876); Bedford R. R. Co. v. Bowser, 48 Pa., 29 (1864); Pitts. & Steubenville R. R. Co. *v.* Biggar, 34 Pa., 455 (1859); Nippenose Mfg. Co. *v.* Stadon, 68 Pa., 256 (1871); Graff *v.* Pgh. & Steubenville R. R. Co., 31 Pa., 489 (1858); Pitts. & Steubenville R. R. Co. *v.* Woodrow, 3 Phila., 271 (1858); 15 Leg. Int. 357; Bavington *v.* Pitts. & Steubenville R. R. Co., 34 Pa., 358 (1859); McCarty *v.* Selinsgrove & North Branch R. R. Co., 87 Pa., 332 (1878); Boyd *v.* Peach Bottom Ry. Co., 90 Pa., 169 (1879); Erie & Waterford Plank Road Co. *v.* Brown, 25 Pa., 156 (1855).

(54) In Lexow *v.* Diamond Drill Co., 5 D. R., 491 (1896) it seems to be taken for granted that the rule is the same as to private as to public corporations.

(55) Lexow *v.* Pa. Diamond Drill Co., 5 D. R., 491 (1896).

that a conditional subscription made after the passage of an act incorporating a company, but before the letters of incorporation were issued, was valid, upon the ground that the passage of the act creating the corporation, clothed it with sufficient power to make any contract which it might deem proper for its own welfare.[56]

In New York it is held that a conditional subscription made before incorporation is void, while in Pennsylvania the subscription is held to be valid and the condition void.[57] It was held in one case, however, that, possibly, if a condition in writing were attached to a subscription made through the commissioners of a proposed public corporation, the subscription would be void; otherwise the condition would be void and the subscription absolute.[58]

293. Conditional Subscriptions Made After Incorporation.

After incorporation subscriptions may be made upon any lawful condition and will be binding upon the subscriber and the corporation.[59] The act of the president of a corporation, accepting conditional subscriptions, is binding upon the company.[60]

294. Parol Conditions.

"It matters not whether the condition were in writing, if, but for such condition, the defendant would not have subscribed. So late as the case of Lippincott *v.* Whitman, 2 Norris [83 Pa.] 244, this court held (per Paxson, J.) that wherever equity would reform or set aside a written instrument on the ground of fraud, accident or mistake, parol evidence is admissible to contradict or deny the terms thereof." [61]

In the case cited it was held, however, that the defendant could not set up a secret parol arrangement by which he might be released, while his fellow subscribers remained bound.

"After the organization of the company a condition is binding and obligatory, and ordinarily this is so, though it rests in parol,

(56) Hanover Junc. & Susq. R. R. Co. *v.* Grubb, 82 Pa., 36 (1876).

(57) Cook on Corporations, Sec. 80.

(58) Nippenose Mfg. Co. *v.* Stadon, 68 Pa., 256 (1871).

(59) Ligonier R. R. Co. *v.* Williams, 35 Leg. Int., 40 (1878); Pgh. & Connellsville R. R. Co. *v.* Stewart, 41 Pa., 54 (1861); McCarty *v.* Selinsgrove & N. Branch R. R. Co., 87 Pa., 332 (1878); Quaker City Apartment House Co. *v.* Kirk, 26 Pa. C. C., 404 (1901); 10 D. R., 292.

(60) Pgh. & Connellsville R. R. Co. *v.* Stewart, 41 Pa., 54 (1861).

(61) Miller *v.* Hanover Junc. & Susq. R. R. Co., 87 Pa., 95 (1878).

if, except for such condition, the subscription would not have been made. The latter part of this proposition is subject, however, to the qualification that the rights of co-subscribers are not affected thereby. Bowser *v.* Bedford R. R. Co., 12 Wright [48 Pa.] 29 (1864); Caley *v.* The R. R. Co., 30 P. F. Smith [80 Pa.] 363 (1875); Graff *v.* The R. R. Co., 7 Casey [31 Pa.] 489 (1858); Miller *v.* R. R. Co. ante, 87 Pa., 95." [62]

"When a party has signed an unconditional subscription agreement, in which many other persons join, he cannot escape liability to the corporation by showing that his subscription was subject to a parol condition, without also showing that all the subscribers assented to the condition as to his particular subscription, or that all subscriptions were subject to the same parol condition."[63]

In an action to enforce payment of a subscription for the stock of an incorporated collection company, an affidavit of defense averring that the defendant subscribed on the faith of representations, *inter alia,* that branch offices would be established, and that the same were not afterward established, is insufficient to prevent summary judgment.[64]

A person who subscribes to the capital stock of a corporation cannot successfully defend against a suit on his subscription by averring that a parol agreement made at the time of the subscription was violated by the company, where the parol agreement is supported by his own testimony only, and is contradicted by the written agreement of subscription and by the testimony of the agent of the company.[65]

In a subscription to the stock of a corporation the covenant was to pay money on call. In a suit therefor the defendant offered to prove an oral agreement that he might pay in labor and materials, without offering to show that he attempted to ascertain where and when he could do so, or made a tender thereof. Held, that the offer was not admissible.[66]

(62) McCarty *v.* Selinsgrove & North Branch R. R. Co., 87 Pa., 332 (1878).

(63) Jeanette Bottle Works *v.* Schall, 13 Pa. Super. Ct., 103 (1900). See Guarantee & Collection Co. *v.* Mayer, 141 Pa., 511 (1891).

(64) Guarantee & Collection Co. *v.* Mayer, 141 Pa., 511 (1891).

(65) Phila. & Del. R. R. Co. *v.* Conway, 177 Pa., 364 (1896). The testimony of such subscriber as to the parol agreement is, however, competent evidence. Rinesmith *v.* People's Freight Ry. Co., 90 Pa., 262 (1879).

(66) McClure *v.* People's Freight Ry. Co., 90 Pa., 269 (1879).

Representations made by the agent of a college, at the time of procuring a subscription to the stock, that, by reason of the subscriptions made and to be made, the scholarship, which the subscriber was to have in consideration for his stock, would be worth the amount of subscription when the same should be payable, are to be treated as expressions of opinion only and will not avoid the contract.[67]

295. Conditions as to Location of Lines or Plants.

A subscription paper set out the termini of a railroad and the route over which it would be constructed. Held, that this was an agreement that the termini of the route should be as stated, and that, if the company materially changed these, a subscriber would be released.[68] And this, though the change of route were authorized by act of assembly.[69]

A promise to subscribe for a certain amount of stock in a plank road company to induce the selection of a particular route, if accepted, is valid and may be enforced by the company. The measure of damages is the difference between the value of the stock at the time of trial and the amount agreed to be paid for it.[70]

Where the defense to an action for the amount of a subscription was, that the subscription was made conditional on the road of the company running through a particular place, but it appeared that the subscriber had acted as a judge of election at an election held by the company after its charter was granted, a judgment for the subscriber was reversed.[71]

The property of a railroad company, chartered to build a road between specified termini, was sold under a mortgage and the company reorganized as the B company. C subscribed to the stock of B company and afterwards defended an action to recover his subscription, on the ground that the road was not built between the termini designated in the charter of the original company. Held,

(67) Coil v. Pgh. Female College, 40 Pa., 439 (1861).

(68) Caley *v.* Phila. & Chester Co. R. R. Co., 80 Pa., 363 (1876); Pgh. & Steubensville R. R. Co. *v.* Woodrow, 3 Phila., 271 (1858); 15 Leg. Int., 357.

(69) Manheim, Petersburg & L. P. R. Co. *v.* Arndt, 31 Pa., 317 (1858). *Contra,* Irvin *v.* Tpk. Co., 2 P. & W., 466 (1831).

(70) Rhey *v.* Ebensburg & Susq. Pl. Rd. Co., 27 Pa., 261 (1856).

(71) Pgh. & Steubenville R. R. Co. *v.* Proudfit, 2 Pitts., 85 (1860).

that B company was not compelled to complete the whole road and that it might recover from C.[72]

Where a person subscribed for shares of a railroad company on the express condition that the company should *locate* and *construct* its railroad along a certain route, paid one instalment and part of the second, but delayed payment of the balance, as the calls were made, until the company—before the road was *constructed* along the route mentioned—suspended operations, after which payment was refused, upon the ground that though the road had been *located* by the company, they had not *constructed* it, according to condition, held, in an action brought therefor by the company, that the promise of subscription being precedent to that of construction, the defendant could not insist upon performance by the company while he refused performance on his part, and that the road having been located as stipulated, and completed as far as the means of the company would allow it, it was a compliance with the condition and the company was entitled to recover.[73]

"It is involved in the nature of a subscription to the capital stock of a company for making a road from one place to another that the termini are part of the contract." Where a company procured an act of assembly changing the termini of its road, prior subscriptions were held no longer binding.[74]

Where a subscription was to the stock of a proposed corporation "for the purpose of erecting a manufactory in the Borough of Auburn," and the company erected its plant, not in said borough, but in an adjoining township, held, that the subscription was not enforceable, though the charter provided that its business was to be transacted in said borough.[75]

A contract of subscription to stock provided for the building of a railroad according to a certain survey, the original route running within five hundred feet of the subscriber's mill. The route was changed so as to make it run twelve hundred feet therefrom. The subscriber contended that this change was material; that his subscription was induced by the location of the original survey, and that his interests were seriously injured by the alteration, and

(72) Chartiers Ry. Co. *v.* Hodgens, 85 Pa., 501 (1877).
(73) Miller *v.* Pitts. & Connellsville R. Co., 40 Pa., 237 (1861).
(74) Manheim, Petersburg & L. P. R. Co. *v.* Arndt, 31 Pa., 317 (1858).
(75) Auburn Bolt Works *v.* Shultz, 143 Pa., 256 (1891).

offered evidence to this effect, which the court rejected. Held, that he should have been permitted to show that the alteration in the route was, as to him, a material variation.[76]

296. Subscriptions Conditioned on a Certain Amount of Stock Being Subscribed For.

A condition in a subscription for stock that the subscription shall be binding only in case a certain amount of stock is subscribed for, is valid, and one which the parties to the contract had a right to stipulate for, and the person subscribing on such condition cannot be held liable until it is shown that the condition has been complied with; and where a person agrees to take stock in a corporation on condition that others subscribe to the same stock, it is implied in the contract that the original subscriber shall be charged by any evidence which would be sufficient to charge the others in actions on their subscriptions.[77]

A subscriber to stock in a proposed corporation has a right to expect that the capital named in the articles shall be raised, because the articles explicitly so state, and they are necessarily to be considered in deciding what are the terms of the subscriber's contract; wherefore an affidavit of defense, filed in a suit to recover the amount of a subscription for stock, which affidavit sets forth that the subscription paper recited that 16,500 shares were to be issued to the subscribers for cash, but that only a part of said number of shares had been subscribed for, is sufficient to prevent judgment.[78]

In a subscription to the stock of a railroad company it was stated that the road was to be begun "as soon as sufficient funds shall be subscribed to carry on the work." Held, that the assurances of the officers, at a public meeting held for procuring subscriptions, at which the defendant subscribed, that the money would not be called for until $150,000 was subscribed, were evidence—that being the inducement on which the subscription was obtained.[79]

(76) Moore *v.* Hanover Junc. & Susq. R. R. Co., 94 Pa., 324 (1884). "In Miller *v.* Hanover Junction & Susquehanna R. R. Co., 87 Pa., 95, a secret, parol condition was set up to defeat the subscription. . . . Here the defendant sets up no secret, parol condition, but a condition found in the subscription paper itself."

(77) Phila. & W. Chester R. Co. *v.* Hickman, 28 Pa., 318 (1857).

(78) Spellier Elec. Time Co. *v.* Leedom, 149 Pa., 185 (1892).

(79) Caley *v.* Phila. & Chester Co. R. Co., 80 Pa., 363 (1876).

A subscription to the stock of a railroad company was "on condition that, in the judgment of the directors . . . . a sufficient amount is subscribed . . . . to grade and bridge the route, including the right of way . . . . otherwise these subscriptions to be void." The directors passed a resolution that in their judgment sufficient stock had been subscribed, etc. Held, that if the board acted in good faith, the condition was performed, and that evidence that the actual cost of grading, etc., was much in excess of the amount subscribed, was not admissible for the defendant in the suit, because the *bona fides* of the directors' judgment was not to be tested by the event, but by what was in their minds when the resolution was passed.[80]

The charter of a normal school provided that "as soon as a sufficient number of shares have been subscribed for and a sufficient amount of money paid in, the trustees shall erect such building as will meet the requirements of the act of assembly." This did not render the subscriptions to stock conditional. It was not required that all necessary means should be provided before beginning to erect. In a suit against a subscriber for a second instalment on account of his subscription, evidence that he had paid the first on representations of a trustee that enough stock had been subscribed for to finish the building, was inadmissible to rebut the presumption that he had ratified his subscription by paying the first instalment on his stock. Defendant had voted at meetings of stockholders, offered to sell his stock, and paid an instalment, knowing the building was being erected.[81]

When parties stipulate that the capital stock of a corporation shall be subscribed to a certain amount before the contract becomes binding, they are presumed to intend that the subscriptions shall be valid and legally enforceable, and a subscription which is not cannot be considered as coming within the terms of the contract.[82]

But when subscriptions are made on condition that a certain amount of stock shall be subscribed, and that amount is not subscribed by reason of the fact that a small amount of the subscriptions made by married women were void, persons subscribing subsequently to the subscriptions of such women may not set up

(80) Cass *v.* Pgh., Va. & Charleston Ry. Co., 80 Pa., 31 (1875).

(81) Craig *v.* Cumb. Valley State Normal School, 72 Pa., 46 (1872).

(82) Chicago Bld. & Mfg. Co. *v.* Browning, 19 Pa. Super. Ct., 355 (1902).

a failure of said condition in a proceeding in equity against them by the creditors of the company to compel the payment of the stock subscribed for by them.[82*]

297. Subscriptions Conditioned on the Amounts Paid Thereon Being Appropriated to Particular Purposes.

Where the condition of a subscription was that the amount subscribed should be devoted to building a certain portion of a railway and be paid when the sum of $100,000 had been subscribed for that purpose, and the act of incorporation provided that the subscription should become valid on paying one dollar to the commissioners for each share subscribed for, and when ten per cent. of the capital had been paid in and one dollar paid on each share letters patent should issue—such condition of subscription being within the power of the company to make—held that such a subscription was binding on the subscriber, on the fulfillment of the condition, though no payment of one dollar per share had been made upon the subscription at the time of making the same.[83]

A clause in a subscription to the stock of a proposed railroad company that no assessments shall be made unless for work actually done in grading, etc., is not contrary to public policy and will be enforced against the company seeking to collect assessments.[84]

298. Waiver of Conditions.

It may be shown by acts and declarations of a party making a conditional subscription that there has been a release or waiver of the conditions, which will entitle the company to recover at law.[85]

299. Conditions as to the Manner of Payment of Subscriptions.

A payment by a subscriber in cash, without call, after a special contract that he may pay in materials, will not estop him from setting up that contract as a defense against a claim for the payment of the whole subscription in cash.[86] But in a suit to re-

(82*) Cornell's Appeal, 114 Pa., 153 (1886).

(83) Hanover Junction etc. R. R. Co. *v.* Haldeman, 82 Pa., 36 (1876).

(84) People's Freight Ry. Co. *v.* Hench, 2 Walker, 478 (1883).

(85) Hanover Junction etc. R. R. Co. *v.* Haldeman, 82 Pa., 36 (1876). See Section 305, Estoppel to Deny Subscriptions.

(86) Pgh. & Connellsville R. R. Co. *v.* Stewart, 41 Pa., 54 (1861).

cover a subscription to the stock of a railroad company, when the covenant was to pay money on call, an offer to prove an oral agreement that the subscriber might pay in labor and materials, without offering to show that he attempted to ascertain when and where he could do so, or making tender thereof, was held inadmissible.[87]

A, the agent of a company, contracted with B to supply the company with lumber, to be paid for, one-half within the first fifteen days of each month, and the other half to be paid in the stock of the company at par. B brought suit to recover the whole amount of his claim in money. Held, that the agreement to take pay in stock for one-half the value of the lumber was absolute, and not contingent on the prompt payment of the cash portion, and where there had been no refusal to deliver the stock, the mere failure to pay cash at the times appointed did not enable B to rescind the contract and demand payment of the whole in money.[88]

In a suit to recover the amount of an alleged subscription, an affidavit of defense is insufficient which avers that the subscription was made on the express condition that it should be paid in lumber and material, when the subscription agreement signed by the defendant is for a certain sum, without any condition.[88*]

300. Avoidance of Subscriptions by Change in Object of Corporation.

Whenever a power which the subscriber cannot control intervenes to alter a material point in his contract, without his assent, it works his release.[89]

"Where an assessment is sued for to advance objects essentially different from those originally contemplated, they cannot be recovered because they are not made in conformity to the defendant's special contract with the corporation. . . . . It is equally well settled by the authorities that modifications and improvements in the charter, useful to the public and beneficial to the company and in accordance with what was the understanding

(87) McClure *v.* People's Freight Ry. Co., 90 Pa., 269 (1879).
(88) Phillips et al. *v.* Allegheny Car Co., 82 Pa., 368 (1876).
(88*) Keeley Stove Co. *v.* Betz, 1 Lanc. L. R., 145 (1883).
(89) Caley *v.* Phila. & Chester Co. R. Co., 80 Pa., 363 (1876).

of the subscribers as to the real object to be effected, do not impair the contract of subscription." [90]

Where a supplement to a charter wholly changes the purpose for which a corporation was created, the original subscribers are freed from liability to assessments upon their subscriptions to its stock,[91] but an alteration in the charter of a railroad company by which the additional privilege is given of extending its road is not such an invasion of the contract of subscription as will release a subscriber from his liability, even though such additional privilege may incidentally extend the liabilities of the company.[92] And where, after subscribing for stock under an act of assembly which required subscriptions to a certain amount before corporate powers should be granted, a subsequent act was passed reducing the amount of subscription required, held, that the change would not release from liability a subscriber who had voted at the organization and for directors.[93]

An act supplementary to the charter of a turnpike road company divided the company into two corporations, A and B, and provided that persons who had subscribed to the stock of the original company at a certain place should be members of A company while those who subscribed at another place should be members of B company. Held, that said supplementary act impaired the contract of the subscribers to the stock of the original company, and that non-consenting subscribers were released from their subscriptions.[94]

A stockholder in a bank who has paid part of his subscription, voted at elections and received dividends, is estopped, in a suit to recover the balance of the subscription, from setting up that the corporation as organized was of a different nature from the one he agreed to subscribe to.[95]

A change in the charter of a railroad company authorizing it

(90) Everhart *v.* West Chester & Phila. R. Co., 28 Pa., 339-53 (1857), citing Irvin *v.* Tpk. Co., 2 P. & W., 466; Grey *v.* Monon. Nav. Co., 2 W. & S., 156; Clark *v.* Same, 10 Watts, 364; Indiana Tpk. Co. *v.* Phillips, 2 P. & W., 184.

(91) Southern Penna. I. & R. R. Co. *v.* Stevens, 6 W. N. C., 70 (1878).

(92) Gray *v.* Monon. Nav. Co., 2 W. & S., 156 (1841); Cross *v.* Peach Bottom Ry. Co., 90 Pa., 392 (1879).

(93) Bedford R. R. Co. *v.* Bowser, 48 Pa., 29 (1864).

(94) Indiana & Ebensburg Tpk. Co. *v.* Phillips, 2 P. & W., 184 (1830)

(95) Barlow *v.* Wren, 1 Walker, 297 (1881).

to issue preferred stock, is not such a radical change as will release a subscriber.[96]

301. When Contract of Subscription is Perfected.

A person subscribed for twenty shares of stock of a railroad company on June 16, 1847, "providing that the construction of said road is prosecuted," but retained his subscription in his own hands until 1854, when the book containing it and other subscriptions procured by him as agent was delivered to the company. In an action to recover the subscription, held, that the contract did not take effect until the delivery of the book containing it.[97]

G solicited subscriptions to the stock of a corporation, took a subscription book from an agent of the company, entered his own subscription in it and persuaded others to subscribe therein. Subsequently, he cut his name out of the book, and returned the book to the company. Held, that he had perfected a contract with the company and was as much bound as if he had left his name in the book.[98]

302. Subscriptions Upon Which No Calls Have Been Made Within Six Years.[99]

It was originally held in Pennsylvania that where a subscription promised to pay for stock "in such manner, at such times and in such proportions as shall be determined by the president and managers of said company," the statute of limitations did not begin to run against such subscription until such determination and demand,[100] and that is now the law in every State except Pennsylvania.[1]

It was afterwards held, however, that where a corporation did not make calls on its subscriptions until after six years from the date of subscription, an action for the amount of such calls was barred. This holding was based upon a presumption, "by analogy to the statute of limitations," that after six years without calls

(96) Everhart *v.* W. Chester & Phila. R. Co., 28 Pa., 339 (1857).
(97) Greer *v.* Chartiers R. R. Co., 96 Pa., 391 (1880).
(98) Pgh. & Connellsville R. R. Co., *v.* Plummer, 37 Pa., 413 (1860).
(99) See Sec. 309, *et seq.*
(100) Sinkler *v.* Tpk. Co., 3 Pen. & W., 149 (1831).
(1) Cook on Corporations, Sec. 195.

the enterprise was abandoned, but, in the course of time, the "presumption by analogy" was dropped, and the statute of limitations was said to directly apply. In a recent case[2] the Supreme Court says:

"It was expressly held in Pgh. etc. R. R. Co. *v.* Byers, 32 Pa., 22, and the kindred cases already cited that where no call is made upon subscriptions, to corporate stock for six years the liability of the subscriber is barred by the statute of limitations. . . These decisions, however, have not commanded uniform assent, and it must be confessed that they are not easy to reconcile with the cases that hold that a call or assessment by the corporation is a necessary foundation for a right of action against the stockholder."

In a still more recent case, however,[2*] the Supreme Court overrules the earlier cases and decides that where a subscription to stock is not presently payable in full, but, by its terms, is to be payable from time to time as called for by the company, the statute of limitations does not begin until a call has been made, and it is not necessary that such call shall be made within six years from the date of the stock subscription.

"We conclude, therefore, that R. R. Co. *v.* Byers, 32 Pa. 22; McCully *v.* R. R. Co., 32 Pa., 25; R. R. Co. *v.* Graham, 36 Pa., 77, and the cases which have followed them are not authorities for a general rule in cases of subscriptions to corporate stock."

References to the early cases, now overruled, will be found in the note.[3]

(2) Swearingen *v.* Sewickley Dairy Co., 198 Pa., 68 (1901).

(2*) Cook *v.* Carpenter, No. 1, Lipper's Appeal, 212 Pa., 165 (1905).

(3) Pitts. & Connellsville R. R. Co. *v.* Byers, 32 Pa., 22 (1858); McCully *v.* Pitts. & Connellsville R. Co., 32 Pa., 25 (1858); Pitts. & McConnellsville R. R. Co. *v.* Graham, 36 Pa., 77 (1859); Hamilton *v.* Clarion, etc. R. R. Co., 144 Pa., 34 (1891); Pitts. & Connellsville R. R. Co. *v.* Plummer, 37 Pa., 413 (1860).

"The principle which ruled the cases of McCully *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 25; Byers *v.* Same, Id., 22, and Same *v.* Graham, 36 Pa., 77, is not developed in this case. In those cases by analogy to the statute it was held that where the work had not been prosecuted according to the requirements of the act of incorporation, and no calls made within six years from the date of the subscription for payments on account of stock, a presumption of the abandonment of the project arose in favor of the subscriber, and that six years was a bar to the remedy by call, and to a suit to recover instalments called for." Allibone et al. *v.* Hager et al., 46 Pa., 48 (1863).

In Bell's Appeal, 115 Pa., 88 (1886) it is held that the statute of limitations begins to run against a subscription to stock from the date of incor-

The following decisions have lost most of their importance since the decision in Cook *v.* Carpenter, 212 Pa., 165, *supra*:—

The statute of limitations has no application to a subscription to the stock of a corporation where the delay in calling it was the result of a corporate policy in which the subscriber united as a director.[4]

And where a subscription is conditional the statute runs only from the date of the performance.[5]

The statute does not begin to run against a subscription made personally by an agent of the corporation for the purpose of obtaining subscriptions, until the date of the delivery by the agent of the book containing his own subscription and those of others obtained by him.[6]

A call made by the board of directors within six years from the date of the subscription, payable under the by-laws as required by the directors, fixes the liability of the subscriber for the amount so called, and suit for such an amount by an assignee for the benefit of the creditors, brought within six years from the date of call, is not barred by the statute.[6*]

303. Subscriptions of Corporators.

The requirement of a statute as to the number of corporators

poration, but the statute is barred by filing a bill in equity against a stockholder compelling payment of unpaid stock in discharge of claims of creditors. Bringing in the stockholder by amendment has the same effect.

Franklin Savings Bank to use etc. *v.* Bridges, 20 W. N. C., 43 (1887) was a case of assumpsit by assignee for the benefit of creditors, to recover unpaid assessments on stock. Here the assessment was made prior to the assignment. The Court held that immediately on the assignment "the depositors and creditors were entitled through the assignee to demand that unpaid subscriptions should be paid," and that the statute ran from the date of assignment. The plea here was non-assumpsit *infra sex annos,* so that the issue of the applicability of the statute (and not of a rule in analogy to it) was squarely presented. See, generally, Modern Life Ins. & Imp. Trust Co. *v.* Kellar, 3 Pa. C. C., 118 (1887); Shackamaxon Bank *v.* Disston et al., 4 Pa. C. C., 201 (1887); Lehigh Coal & Nav. *v.* Blakeslee, 20 Pa. C. C., 289 (1898). Farmers' Co-operative Trust Co. *v.* Hazen, 26 Pa. C. C., 6 (1901), anticipated the recent action of the Supreme Court and held that the statute runs only from the date of call.

(4) Estate of James H. Lindsay, dec'd, 19 Pa. C. C., 3 (1897).

(5) Cornell's Appeal, 114 Pa., 153 (1886).

(6) Pgh. & Connellsville R. R. Co. *v.* Plummer, 37 Pa., 413 (1860).

(6*) Athens Car & Coach Co. *v.* Elsbree, 19 Pa. Super. Ct., 618 (1902).

to form a corporation is mandatory. The required number is indispensable, and the interest of each, however small, must be real, and when a corporation refused to receive payment for the subscription of a corporator and denied his right as a stockholder upon the ground that his subscription was wholly for the use of another corporator, it was held, in a bill to compel the corporation to admit the subscriber as a stockholder, that the defense, if true, was a fraud on the law.

"The law fixes the number [of incorporators] plainly and imperatively, and though the interest of some of them may be small, it must be real. Even, therefore, if the agreement set up in the answer were fully proved, the respondent could not be permitted, against the policy of the law, to make it available as a defense." [7]

An incorporator will not be permitted, in an action to recover his subscription, to say that he did not in fact subscribe for the number of shares set forth in the certificate of incorporation which he joined in executing, but that there was a secret understanding at the time of subscription that his subscription was for a much smaller number of shares, the difference in number between the actual number and that set forth in the certificate to be treated as treasury stock.[7*]

304. Payment of Subscriptions.

Where each stockholder of a corporation was individually liable for its debts to the amount of the balance unpaid on his stock, receipts by one who conveyed lands to the corporation necessary and authorized for the enjoyment of its franchises, to stockholders for the amounts unpaid by them on their stock, and which amounts were credited to them on the books of the company, are good payments upon their stock. They will not be affected by an after-discovered error in the judgment of the company as to the value of the land, and resolutions passed by the directors invalidating these payments, but providing that stockholders unable or neglecting to pay an instalment called in lieu of such payments may return their old certificates and receive new ones to the amount of their actual cash payments, will not be binding on the

(7) Appeal of Rowley et al., 115 Pa., 150 (1886). See opinion of lower court *sub nom.* Tillyer *v.* Hero Jar Co., 17 Phila., 153 (1885); 42 Leg. Int., 150.

(7*) Greater Pittsburgh Real Estate Co. *v.* Riley, 210 Pa., 283 (1904).

stockholders unless they voluntarily consent, and the presence of a stockholder as a director when the resolutions were passed, authorizes no other inference than that he assented to them as a whole.[8]

The proviso in Sec. 17, Act of April 29, 1874, that no stock shall be issued "except for money, labor done or money or property actually received" does not prevent payment for labor or services *bona fide* to be thereafter rendered.[9]

A bill in equity may be sustained by the assignee of an insolvent corporation against a large number of stockholders of the company as parties defendant, to recover unpaid subscriptions to the capital stock, and this although it appears from the bill that all of the unpaid subscriptions are necessary to pay the corporate debts, and that, therefore, no question of accounting is involved.[9*]

In an action against an original subscriber to the stock of a corporation to recover an unpaid balance of an alleged cash subscription, it is proper to permit the defendant to offer evidence to show that the corporation had agreed that if the defendant would leave the position which he held and become president of the company, the corporation would give him full paid stock to the amount claimed in the suit.[10]

Sec. 12 of the Act of April 29, 1874, as last amended by the Act of March 24, 1905, P. L., 56—see Sec. 235—provides that no note or obligation given by a stockholder shall be considered as payment of any part of the capital stock.

305. Estoppel to Deny Subscriptions.

The principle of estoppel does not apply to cases of subscription on conditions precedent. Where subscriptions are made upon condition precedent, the subscribers do not become members of the corporation nor does any liability attach until the performance of the condition. When, therefore, a person who has made a conditional subscription to the stock of a corporation makes payments on account of his subscription or exercises any of the powers and privileges of a member of the corporation, it is evident either

(8) Carr *v.* Fevre, 27 Pa., 413 (1856). See Sec. 299. Conditions as to the Manner of Paying Subscriptions.

(9) Shannon, Receiver, *v.* Stevenson, 173 Pa., 419 (1896).

(9*) Cook *v.* Carpenter, No. 1, Lipper's Appeal, 212 Pa., 165 (1905).

(10) Shannon, Receiver *v.* Stevenson, 173 Pa., 419 (1896).

that the condition of his subscription was not a condition precedent or that he has waived the same, and in either case his subscription is absolute, though the condition remaining as a condition subsequent may entitle him to recover damages from the company if the same is not performed.

Where a person orally subscribed for certain shares of stock and on the faith of his subscription debts were contracted for improving the company's plant, with the knowledge and approval of the subscriber, he was held estopped to deny the subscription.[11]

Where feigned subscriptions are made for the purpose of obtaining further subscriptions,[12] or where subscriptions are made with an understanding with officers of the company that the subscriber is not to hold or pay for the stock subscribed for, which is to be cancelled,[13] the subscribers will be estopped from denying the validity of their subscriptions.

Informalities in the manner of subscription are cured by the exercise by the subscriber of the rights of a stockholder, as by voting at corporate meetings, etc., he being estopped in such case to deny the informality of his subscription.[14]

A stockholder in a bank who had paid part of his subscription, and had voted at elections and received dividends, was held to be estopped, in a suit to recover the balance of the subscription, from setting up that the corporation, as organized, was of a different nature from the one he agreed to subscribe to.[15]

306. Releases from Subscriptions.

The officers of a corporation may not release a subscription without adequate compensation,[16] nor waive the payment thereof,[17] but it seems that they may compromise disputes and hence release a part of a subscription in order to secure the residue.[17*] The rights of other stockholders and of bondholders are vested in the subscription.

(11) Perkiomen Brick Co. *v.* Dyer, 187 Pa., 470 (1898).

(12) Graff *v.* Pgh. & Steubenville R. R. Co., 31 Pa., 489. (1858).

(13) Robinson *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 334 (1858).

(14) Clark *v.* Monongahela Nav. Co., 10 Watts, 364 (1840).

(15) Barlow *v.* Wren, 1 Walker, 297 (1881). See Sec. 308, Defenses to Subscriptions.

(16) Braddock Elec. Ry. Co. *v.* Bily, 11 Pa. Super. Ct., 144 (1899).

(17) McComb *v.* Credit Mobilier of America, 13 Phila., 468; 5 W. N. C. 80, (1878).

(17*) Phila. & W. C. R. R. Co. *v.* Hickman, 28 Pa., 318 (1857).

If a company abandon its undertaking and refund some of the subscriptions, the other subscribers are discharged; but if a subscriber consent to the refunding of said subscriptions, he will be estopped from setting up such refund as a defense.[18]

When a subscriber to the stock of a corporation who has been released from his subscription subsequently votes at an annual election for directors, and is himself elected a director, his acts are evidence of a subscription of some kind, and, in the absence of proof of a special contract, warrant the inference that he had reassumed his original subscription; but they are shorn of their importance where a special contract accounting for them is shown.[19]

Where, however, a subscriber has been released from his subscription by the failure of the company to call in its subscriptions within six years after their date, he is not rendered again liable by giving an incomplete letter of attorney to vote on a question of accepting a supplement to the charter, etc.[20]

Inasmuch as the officers of a corporation cannot release any of the subscribers without the consent of all the stockholders, the fact that such officers have erased or permitted to be erased from the subscription books the names and subscriptions of certain subscribers, does not constitute a defense to an action against a subscriber whose name was not erased, for the amount of his subscription.[21]

The act of incorporation of a plank road company provided that the charter should become null and void unless the road was begun in three years. The work not having been begun within that period, an extension of time was granted by a second act, which, by its terms, continued in force the original subscriptions. Held, that the company had not complied with the requirements of its original charter, which was the basis of the subscriptions, which the legislature had no power to revive.[22]

A payment made by canceling a debt of a company past due is valid.[23]

(18) McCully *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 25 (1858).
(19) Pgh. & Connellsville R. R. Co. *v.* Stewart, 41 Pa., 54 (1861).
(20) McCully *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 25 (1858).
(21) Bristol Iron & Steel Co. *v.* Selliez, 175 Pa., 18 (1896).
(22) Greencastle and Md. Line Plank Rd. Co. *v.* Davidson, 39 Pa., 435 (1861).
(23) Carr *v.* Le Fevre, 27 Pa., 413 (1856).

307. Reduction of Subscriptions.

A corporation organized under the Act of 1874, with a capital stock of $100,000 divided into shares of $100 each, all of which is subscribed at the time of organization and 45 per cent. of which has been paid in, may, when solvent and without existing creditors, call in the 1,000 shares of partly paid stock, cancel the original subscriptions and in place thereof issue 450 full-paid shares to the subscribers, retaining the remaining 550 shares for the use of the corporation. Such reduction need not be made at a meeting held as provided by law for the reduction of capital stock.[23*]

If the meeting is attended by all of the stockholders, except one, and such stockholder subsequently surrenders his part-paid stock, and accepts a less amount of full-paid stock in exchange therefor, the validity of such meeting cannot be attacked by a creditor whose debt against the company was created several years after the meeting; nor in such a case can subsequent creditors of the corporation maintain actions against the shareholders individually for the corporate debts, merely because the corporation failed to file annual reports in the office of the recorder of deeds as required by Cl. 8 of Sec. 39 of the Act of April 29, 1874, and this is especially so where such creditors had actual notice of the reduction of the subscriptions.[23*]

308. Defenses to Subscriptions.

A subscriber to the stock of a company, who has participated in the organization of the corporation and acted as a director, cannot set up the unconstitutionality of the act under which the company is incorporated, as a defense to an action to recover the amount of his subscriptions,[24] nor an alleged invalidity of the charter.[24*]

In an action to recover the amount of a subscription, an affidavit of defense is insufficient to prevent judgment, which avers that the directors of the corporation released certain other sub-

(23*) Vrooman *v.* Vansant Lumber Co., 215 Pa., 75 (1906).

(24) Weinman *v.* Wilkinsburg & E. L. Pass. Ry. Co., 118 Pa., 192 (1888); 45 L. I., 176.

(24*) Penna. Milk Producers' Assn. *v.* First Nat. Bank of Honeybrook, 20 Pa. C. C., 540 (1898). See Sec. 45.

scribers, specifically named, and that the directors had fraudulently and wastefully managed the company's affairs.[25]

An affidavit of defense filed in an action by a corporation to recover an alleged subscription to stock is sufficient, where it appears from the statement and affidavit that the defendant with others subscribed to certain preliminary expenses, prior to the incorporation of the plaintiff company, in the taking out of patents, but there is nothing to show that the corporation had acquired the right to the unpaid subscriptions to the original fund by assignment, succession or otherwise.[25*]

The fact that individual subscribers to the stock of a corporation, who gave their promissory notes for the amounts of their subscriptions, subscribed for the benefit of another corporation, which could not legally become a subscriber to such stock, is no defense to an action on the notes by the corporation to which they were given, against the makers of such notes.[26]

An incorporator of a corporation of the first class, who states in the articles of association that he has subscribed for a certain number of shares of stock will not be permitted, in an action against him for the amount of his subscription, to say that there was a secret understanding whereby his actual subscription was to be a smaller sum, the difference between which and the amount appearing in the articles of association to be considered as treasury stock.[26*]

It is no defense to an action to recover the amount of a subscription that it was made at the request of the president of the company with the understanding that the subscriber was not to hold or pay for the stock subscribed for, and that the same was to be cancelled. Such an agreement would be a fraud on the company and on all subsequent subscribers.[27]

A subscriber to the stock of a corporation, who, after the insolvency of the company and notice to him that his stock would be sold unless assessments were paid, voluntarily assigns the certi-

(25) Bristol Iron & Steel Co. *v.* Selliez, 175 Pa., 18 (1896). As the directors had no power to release the other subscribers, their action would, of course, constitute no defense for defendant.

(25*) Arnold Monophose Electric Co. *v.* Chew, 21 Pa. Super. Ct., 407 (1902).

(26) Penn Safe Dep. & T. Co. *v.* Thomas et al., 16 Pa. C. C. 650 (1895).

(26*) Greater Pgh. Real Estate Co. *v.* Riley, 210 Pa., 283 (1904).

(27) Robinson *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 334 (1858).

ficate in blank and delivers it to the treasurer of the corporation, at his request, does not thereby relieve himself from liability for the unpaid portion of the subscriptions.[28]

A subscription by a saloon-keeper to the stock of a brewery company is not illegal because the Act of May 13, 1887, Par. 5, P. L., 108, provides that applicants for saloon licenses must state in their petitions that they are not interested in the profits of a business conducted elsewhere in said county where liquors are sold.[28*]

Where an incorporator received a certificate for unpaid shares which he immediately assigned to the contractor for the works of the company in part payment for such construction, held, in an action against said subscriber for the amount of the subscription, that evidence to show that the contractor's work was badly done was properly rejected, that the corporation received from the defendant the full amount of stock subscribed for, and that, as the corporation had accepted the works, it had used the stock of the defendant in payment therefor.[29]

An affidavit of defense to an action upon a stock subscription, made after the corporation had obtained letters patent, and effected its organization, which avers that the subscription was conditional and that the condition had not been performed, is sufficient, when it does not appear that other subscribers were obtained by reason of the subscriptions of defendant, or that rights of third parties have intervened.[30]

In an action of assumpsit on an agreement to subscribe to the stock of a foreign corporation not registered in Pennsylvania, it appeared that a prospectus was attached to the subscription agreement, setting forth that the company had purchased certain property for the purpose of erecting an apartment house thereon. It further appeared from the statement of claim that such house was being erected. In such case an affidavit of defense is sufficient which avers that the plaintiff never purchased the property designated, and being a foreign corporation could not take title to the same, that the house was being erected by another corporation

(28) Burt *v.* Real Estate Ex. of Phila., 175 Pa., 619 (1896).

(28*) Highland Brewing Co. *v.* Becker, 14 D. R., 863 (1904).

(29) Riverton Water Co. *v.* Hummel, 175 Pa., 575 (1896).

(30) Quaker City Apartment House Co. *v.* Kirk, 10 D. R., 292 (1901); 26 Pa. C. C., 404.

and that defendant's subscription was made on the strength of such representation.[30*]

309. Calls[31]—Definition.

A call is an official declaration, by the proper corporate authorities, that the whole or a specified part of a subscription for stocks is required to be paid.[32] It is commonly used in the sense of a demand for a specified part of a subscription. It is sometimes termed an assessment, though in Pennsylvania, prior to the passage of the Act of May 25, 1887, P. L., 273, repealing so much of Sec. 12 of the Act of April 29, 1874, as provided for an assessment upon stock beyond the par value of the same, that word had a distinct and separate significance.[33]

310. Necessity for Calls.

Where, as in Pennsylvania, subscriptions are expressly made payable in the discretion and on the demand of the directors, a valid call by the directors is a condition precedent to any liability on the subscription, and to the right of the corporation to maintain an action thereon,[34] except in the case of insolvent corporations where the demand of the assignee or receiver is equivalent to a formal call, when all the subscriptions are required to pay the creditors.[35]

311. Who May Make Calls.

The right to make calls is a franchise vested in the managers, whose lawful exercise can be objected to only by creditors or their representatives, and it is the duty of such managers to make calls for unpaid subscriptions whenever the debts of the company re-

(30*) Quaker City Apartment House Co. *v.* Matthews, 21 Pa. Super. Ct., 519 (1902).

(31) See Section 302.

(32) Cook on Corporations, Sec. 104.

(33) See Price's Appeal, 15 W. N. C., 182 (1884); Dairymen's Assn. *v.* Ryan, 2 Chest. Co., 541; Creamery Assn. *v.* Buckwalter, 2 Chest. Co., 544.

(34) Clark & Marshall's Private Corpns., Sec. 498.

(35) Yeager *v.* Scranton Trust Co. and Savings Bank etc., 14 W. N. C., 296 (1884); Citizens' and Miners' Savings Bank and Trust Co. *v.* Gillespie, 115 Pa., 564 (1887); German Ins. Co. *v.* Strahl, 13 Phila., 512 (1878).

quire it. A chancellor will compel directors to make calls when his aid is invoked by creditors or their representatives.[36]

The directors may call in the balance of subscriptions due, in one resolution, making the call payable in instalments to become due at different times.[37] But stockholders cannot be compelled to pay calls, when the purpose of the call is to pay a debt which the directors had no power to contract.[38]

312. Notice of Calls Must be Given.

Notice, either public or otherwise, must be given to subscribers before suit can be brought for the amount called for.[39]

When notified that an instalment was payable, a defendant replied that he was not a stockholder, and that therefore the notice was error. Held, that this was a waiver of notice of calls for instalments under the 8th section of the Act of February 19, 1849, and that the penalty of one per centum per month was recoverable for non-payment of the instalments due.[40]

The amount of a call may be recovered without proving a newspaper publication of notice to subscribers, such notice being necessary—under early acts—to subject the subscribers to the monthly pecuniary penalty for non-payment, and not to found an action for the principal.[41]

313. Liability for the Payment of Calls.

A person appearing as the registered owner of the stock of a corporation upon its books, at the time a call is made upon his stock, is liable therefor, although he made no express promise to pay, was not an original subscriber and may have had his stock transferred upon the books between the date of the call and the date fixed therein for its payment, to a purchaser to whom he had sold it before the call was made, and his liability, once fixed by

(36) Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869). See Chapter 24, Insolvent Corporations.

(37) Hays *v.* Pgh. etc. R. R. Co., 38 Pa., 81 (1860).

(38) Farmers' Co-op. Trust Co. *v.* Hazen, 21 Pa. Super. Ct., 130; 26 Pa. C. C., 6 (1901).

(39) McCarty *v.* Selinsgrove & N. Branch R. R. Co., 87 Pa., 332 (1878). See Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869).

(40) Cass *v.* Pgh. Va. & Ch. Ry. Co., 80 Pa., 31 (1875).

(41) Grubb *v.* Mahoning Nav. Co., 14 Pa., 305-6 (1850); Gray *v.* Monon. Nav. Co., 2 W. & S., 162.

the call, will not be affected by a subsequent resolution of the board of directors, approved by a stockholders' meeting, which, if acted upon, would reduce the capital stock of the corporation.[42]

The statutory provision for the forfeiture of stock for non-payment of calls is not an exclusive remedy, and does not relieve a stockholder from personal liability.[42*]

The Superior Court has held that, under the Act of May 9, 1889, P. L., 180, amending Sec. 11 of the Act of April 29, 1874, no liability other than that fixed by the statute of one-half of one per centum per month, attaches to delay in paying instalments due on stock subscriptions, and that interest is not due in addition to such penalty;[43] but in an earlier case the Supreme Court, in a creditor's bill against an insolvent corporation, when calls for the full amount of stock had been made by the company, held, that interest might be charged upon the unpaid instalments from the date when the last instalment was due under the call.[44]

The statutory penalty of one per centum per month on unpaid instalments, imposed by the Act of February 19, 1849, is recoverable from the time of the respective calls until judgment; it does not cease at the institution of the suit.[45]

314. Errors in Making Calls.

An error in making a call before liability accrued may be corrected by a subsequent call, after the condition is fulfilled and before suit brought.[46]

Calls made by the treasurer under general authority given by the board of directors are valid, although the resolution conferring such authority does not specify the amount of each call. An omission to record a call for a particular instalment is supplied by the record of a call for all other unpaid instalments.[47]

Where, in the published notice of the declaration of a call the name of the corporation making the same was printed as "the M.

(42) American Alkali Co. *v.* Campbell, 11 D. R., 260 (1902).

(42*) American Alkali Co. *v.* Campbell, 11 D. R., 260 (1902).

(43) Acetylene Lt., Ht. & Pr. Co. *v.* Smith, 10 Pa. Super. Ct., 61 (1899). See Bair & Gazzam *v.* Wilson, 15 Pa. Super. Ct., 131 (1900).

(44) McClintock *v.* Bellevue Cemetery Co. et al., 1 Mono., 126 (1889); Andrew's Appeal, same case.

(45) Bavington *v.* Pgh. & Steubenville R. R. Co., 34 Pa., 358 (1859).

(46) Phila. & W. Chester R. R. Co. *v.* Hickman, 28 Pa., 318 (1857).

(47) Hays & Black *v.* Pgh. & Steubenville R. Co., 38 Pa., 81 (1860).

Navigation Company," instead of "The President, Managers and Company of the M. Navigation Company," the misnomer was held to be immaterial.[48]

315. Miscellaneous.

When the owner of stock in a corporation promises a purchaser of stock, as an inducement for the purchase, that he will pay assessments on the stock when called, the corporation cannot maintain an action on such promise against such promisor to recover assessments.[49]

A director will be presumed to have knowledge of calls made while he is a director.[50]

Assumpsit lies for the recovery of the amount of unpaid calls.[51]

The corporate books are competent to prove the call and the manner of payment,[52] but a call made by the directors is valid though no entry of the resolution is made in the minutes of the directors' meeting.[53]

A company may pay interest on prepaid calls up to the time the calls are due.[53*]

316. Unpaid Subscriptions a Part of the Assets.[54]

Unpaid subscriptions are a part of the assets of a corporation, and a general assignment for the benefit of creditors passes them to the assignee. A chancellor will compel directors to call for subscriptions when his aid is invoked by creditors or their representatives. It is the duty of such managers to call for unpaid subscriptions whenever the debts of the company require it. Their discretion relates only to the time and manner of making the payments.[55]

(48) Crown Slate Co. *v.* Allen, 199 Pa., 239 (1901).

(49) Spellier Elec. Time Co. *v.* Geiger, 147 Pa., 399 (1892).

(50) Bavington *v.* Pgh. & Steubenville R. R. Co., 34 Pa., 358 (1859).

(51) Bavington *v.* Pgh. & Steubenville R. R. Co., 34 Pa., 358 (1859); Comfort *v.* Leland, 3 Whart., 81 (1837).

(52) Hays & Black *v.* Pgh. & Steubenville R. Co., 38 Pa., 81 (1860). When the purchase price of stock is to be paid in ten equal payments, and interest is to be allowed if payment is made in advance, the interest may be collected. Porter *v.* Beacon Contr. Co., 154 Pa., 8 (1893).

(53) Gray *v.* Monon. Nav. Co., 2 W. & S., 156 (1841).

(53*) Hetfield *v.* Addicks, 154 Pa., 1 (1893); Porter *v.* Beacon Con. Co., 154 Pa., 8 (1893).

(54) See Sections 239 and 553.

(55) Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869).

While unpaid instalments on stock ordinarily constitute a trust for the payment of the corporate debts, yet where stock has been issued to a stockholder and settled for by him under an arrangement made in good faith with the company, it is not in the power of a creditor, *in all cases, as a matter of right,* to institute an inquiry as to the value of the consideration given for the stock. Where shares are subscribed for to be paid for by the transfer to the corporation of personal property belonging to the subscribers, at an honest valuation, fairly made and agreed upon between them, the subscribers cannot be held individually liable to creditors because the value of the property, estimated in the light of subsequent events, will not equal the amount at which such property was received.[56]

Where, upon the purchase of additional property the capital has been increased by the issue and distribution of new stock to a much larger extent than the cost or value of the additional property, the stockholders cannot be held individually liable at the suit of a creditor cognizant of, and acquiescing in, the whole transaction.[57]

317. Right of Stockholders to Subscribe for Untaken Stock.

Original or other stockholders have no greater rights than strangers to subscribe to stock untaken.[58]

"There is nothing in any of the authorities cited by counsel which rules that, if no allotment is made giving all the corporators an opportunity to subscribe for untaken stock, the subscription of any shareholder or other person would be illegal. They hold no more than that untaken stock is held by the corporation in trust for the corporators, and must be disposed of for the benefit of all; that it cannot be disposed of *unequally* to the corporators, and, if so disposed of, each corporator injured may have his action against the corporation. There is no case that decides that any stockholder, after the stock has been disposed of, even if done by the corporation in violation of the rights of such stock-

(56) Coit *v.* North Carolina Gold Amal. Co. (U. S. Cir. Ct.) 12 W. N. C., 272 (1882).

(57) Coit *v.* North Carolina Gold Amal. Co. (U. S. Cir. Ct.) 12 W. N. C., 272 (1882).

(58) Curry *v.* Scott, 54 Pa., 270 (1867). The case of Gray *v.* Portland Bank, 3 Mass., 364, and Reese *v.* Bank of Montg. Co., 31 Pa., 78 (1855), distinguished.

holder, has any remedy in equity to compel the issue of such stock to him, or to have the subscription of the one who subscribed to the stock declared invalid." [59]

318. Subcriptions as Escrows.

An agent of a corporation procured a subscription which he agreed to hold until the subscriber should authorize its delivery to the company. A person not a director of the company, obtained the paper to examine it and, without the consent of the agent or the subscriber, delivered it to the company. Held, that evidence of these facts was admissible, and that, though, as a general rule, the delivery of a deed as an escrow cannot be made to the grantee, the subscription in this case having been conditional, the conditions of which the agent had no authority to accept, he might hold the same as an escrow.[60]

319. Municipal Subscriptions.

Municipal subscriptions to the stock of railroads were not unconstitutional prior to the Constitutional Amendments of 1857.[61]

Where an act authorized a county to subscribe to the capital stock of a railroad company, and provided that the bonds to be issued therefor should not be sold for less than par, held, that the county was bound to provide for the accruing interest on such bonds, though they had been disposed of below par, and though there might be a remedy in equity as to a part of the principal.[62]

Where a subscription to the stock of a railroad company on behalf of a city was authorized by ordinance to be made on certain conditions precedent, the subsequent issue of the bonds in payment of the subscription proved the condition to have either been complied with or waived by the city. An ordinance having been passed, as authorized by act of assembly, directing a prospective subscription, "all legal objections being removed," and a subsequent act having removed such objections, the subsequent subscription is deemed to have been made under said acts, and the bonds issued therefor are binding on the corporation issuing them.[63]

(59) Shellenberger et al. *v.* Patterson et al., 168 Pa., 30 (1895).
(60) Cass *v.* Pitts., Va. & Charleston Ry. Co., 80 Pa., 31 (1875).
(61) Com. *v.* Com'rs of Allegheny Co., 32 Pa., 218 (1858).
(62) Com. *v.* Com'rs of Allegheny Co., 32 Pa., 218 (1858).
(63) Com. ex rel. etc. *v.* Councils of Pittsburgh, 43 Pa., 391 (1862).

A municipal subscription to the stock of a railroad company which had previously released its private subscribers from their subscriptions, is not valid, and a recission of the contract will be decreed on a bill filed for that purpose.[64]

Where a county issued bonds in payment of a subscription to the capital stock of a railroad company, under an act providing that they should not be sold under par, and the company disposed of a large quantity at 64 per cent., held, that the county was entitled to rescind the subscription, to have a return of the bonds remaining in the hands of the company and to be paid the par value of those disposed of, and that the parties who bought such bonds at less than par were not necessary parties to the bill to rescind the contract of subscription.[65]

320. Practice.

It is not error to introduce in evidence a contract of subscription varying from that declared upon, where it works no injury to defendants, whose subscriptions were otherwise proven.[66]

Assumpsit lies for the recovery of unpaid instalments of a subscription to the capital stock of an incorporated company.[67]

In an action to recover the amount of a subscription to stock it was held sufficient to prove the act of incorporation, the certificate of the commissioners to the Governor and the letters patent, without proving organization by the election of officers.[68]

Subscriptions to capital stock are subject to attachment execution at the suit of a judgment creditor of the corporation.[69]

In the absence of proof as to the time when a memorandum was added to a formal subscription, the presumption is that it was there when the subscription was made.[70]

321. Miscellaneous.

Assignees of the stock of a corporation formed under the Act of July 18, 1863, are liable for any balances due thereon, especi-

(64) County of Crawford *v.* Pgh. & Erie R. R. Co., 32 Pa., 141 (1858).

(65) County of Lawrence *v.* Northwestern R. R. Co., 32 Pa., 144 (1858). This seems in direct conflict with Com. *v.* Com'rs of Allegheny, 32 Pa., 218 (1858), supra.

(66) Hays & Black *v.* Pgh. & Steubenville R. R. Co., 38 Pa., 81 (1860).

(67) Bavington *v.* Pgh. & Steubenville R. R. Co., 34 Pa., 358 (1859).

(68) Grubb *v.* Mahoning Nav. Co., 14 Pa., 302 (1850).

(69) Peterson *v.* Sinclair, 4 W. N. C., 97 (1877).

(70) Robinson *v.* Pgh. & Connellsville R. R. Co., 32 Pa., 334 (1858).

ally where such corporation has accepted the Act of April 29, 1874.[71]

Where a person subscribed for certain shares of the stock of a proposed corporation and paid the amount required to be paid at the time of subscription, to agents of the commissioners, he is entitled, on the failure of the proposed corporation to be incorporated, owing to the lack of a sufficient number of subscribers, to have the amount of his preliminary payment returned to him, without deduction on account of a percentage claimed by the agent from the commissioners.[72]

When one is debtor to a railroad company for a subscription to its stock to a greater amount than a claim which he holds against the company, he cannot ask for the payment of his debt, in the distribution of the proceeds of the sheriff's sale of the property and franchises of the road, on a judgment of another creditor. The sale by a sheriff of a railroad property and franchises does not pass to the purchaser the debts or mere choses in action due the company from others.[73]

A stockholder need not produce his certificate of stock in order to enable him to receive the amount awarded to him upon a final distribution of the assets of a corporation. The stock ledger and certificate book are the evidence of the ownership of the stock. Where the certificate is lost, no indemnity need be offered by the stockholder.[74]

A construction company which takes subscriptions for the stock of the corporation for which it contracts may agree to pay interest upon payments of subscriptions in advance of the time when such subscriptions are due.[75]

(71) Lexow *v.* Diamond Drill Co., 5 D. R., 491 (1896).

(72) Wharton et al. *v.* Hudson, 3 Rawle, 390 (1832).

(73) Hogg's Appeal, 88 Pa., 195 (1878); Bayard's Appeal, 72 Pa., 453 (1872).

(74) In re St. Nicholas Coal Co., 9 W. N. C., 403 (1880).

(75) Hatfield *v.* Addicks, 154 Pa., 1 (1893). See Miller *v.* Pitts. & Connellsville R. R. Co., 40 Pa., 237 (1861); Pgh. & Connellsville R. R. Co. *v.* Allegheny Co., 63 Pa., 126 (1869).

CHAPTER XVI.

TRANSFERS OF SHARES OF STOCK.

322. Certificates of Stock.
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324. Method of Transfer.
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322. Certificates of Stock.

A stock certificate is a certificate to the effect that ——— is the owner of ——— shares of the capital stock of the ——— company, transferable only on the books of the company by the owner in person or his duly authorized attorney, upon surrender of the certificate properly endorsed. In the case of corporations formed under the provisions of the Act of April 29, 1874, this certificate is signed by the president, vice-president or other officer designated by the board of directors, countersigned by the treasurer and sealed with the seal of the company. See Sec. 323.

Upon the back of each certificate is an assignment in blank, substantially like the following:

"For value received hereby sell, assign and transfer to , shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within named company, with full power of substitution in the premises."

When a certificate is issued to a stockholder a corresponding stub is filled in with the following data: Number of certificate; number of shares for which certificate issues; name of person to whom issued; date of issue. If the certificate be not an original one, the name of the person from whom the stock is transferred, the number of the original certificate, the number of shares for which the original certificate was issued, and the number of shares transferred.

If a stockholder wishes to sell all the shares of stock covered by the one certificate to one person, he fills in the name of such person in the blank assignment and the number of shares represented by the certificate and executes the assignment, usually leaving the space left for the name of the attorney blank, to be filled in with the name of the transfer clerk of the corporation or other officer who enters transfers. A new certificate then issues to the assignee, and the old certificate is cancelled and attached to its corresponding stub.

Should the stockholder wish to sell a less number of shares than is represented by the certificate, he inserts the number in the assignment and a new certificate then issues to the assignee for that number of shares, and another certificate to the stockholder for the balance of shares unassigned.

A stockholder is entitled to as many certificates of stock, not exceeding the number of his shares, as he may require.

323. How Issued—Transfers.

The directors of such corporation shall procure certificates or evidences of stock, and shall deliver them signed by the president, countersigned by the treasurer, and sealed with the common seal of the corporation, to each person or party entitled to receive the same, according to the number of shares by him, her or them respectively held, which certificates or evidences of stock shall be transferable at the pleasure of the holder, in person or by attorney, duly authorized, as the by-laws may prescribe; subject, however, to all payments due or to become due thereon; and the assignee or party to whom the same shall have been so transferred, shall be a member of said corporation, and have and enjoy all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber or holder would have

been, but no certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of directors shall consent thereto.[1]

Any stockholder of any company incorporated under the laws of this Commonwealth shall be entitled to receive a certificate of the number of shares standing to his, her or their credit on the books of the corporation, which certificate shall be signed by the president, vice-president or other officer designated by the board of directors, countersigned by the treasurer and sealed with the common seal of the corporation, which certificate or evidence of stock ownership shall be transferable on such books at the pleasure of the holder, in person or by attorney, duly authorized as the by-laws may prescribe, subject however to all payments due or to become due thereon; and the assignee or party to whom the same shall have been so transferred shall be a member of said corporation and have and enjoy all the immunities, privileges and franchises and be subject to all of the liabilities, conditions and penalties incident thereto in the same manner as the original subscriber or holder would have been. And upon a sale of such stock in satisfaction of any debt for which it is pledged the purchaser shall have the right to compel a transfer of such stock upon the corporation books and the delivery of a proper certificate therefor.[2]

324. Method of Transfer.

The usual method of transferring shares of stock is by executing an assignment thereof, the form of which is printed upon the back of the certificate, together with a power constituting the person named therein the attorney of the assignor for the purpose of making a transfer of the stock upon the books of the corporation issuing the same. The certificate is not a negotiable instru-

(1) Sec. 7, Act April 29, 1874, P. L., 78. See next paragraph and Note 2.

(2) Act of June 24, 1895, P. L., 258, Sec. 1. This act supersedes the seventh Sec. of the Act of April 29, 1874, supra, and effects the following changes: Certificates may be signed by the president, vice-president or other officer designated by the board of directors, instead of by the president only; the prohibition of transfers while the stockholder is indebted to the company is removed, and a purchaser of stock upon a sale thereof in satisfaction of a debt may compel a transfer of the same. Sproul *v.* Standard Plate Glass Co., 201 Pa., 103 (1902). See Sec. 295.

ment, but a written declaration that the holder has a definite share in the capital and profits of the concern, which, though delivered to him, is intended for circulation and virtually addressed to all the world.[3] It is but secondary evidence of ownership, and only useful for purposes of transfer.[4]

The assignment need not have the name of the transferee inserted nor the name of the attorney.[5]

A valid donatio causa mortis may be made of certificates of railway stocks by a delivery of them to the donee without assignment or endorsement in writing.[6]

325. Title Taken by the Transferee.

The assignment of a certificate is only an equitable transfer and must be produced to the corporation, and a transfer made upon the books, before the legal title passes;[7] but as between the transferer and the transferee the title passes absolutely at the delivery of the assigned certificate,[8] and the title of the transferer is divested so far as his attaching creditors are concerned.[9]

326. Status of Transferer and Transferee After Transfer and Before Registry Thereof.

The general rule is, that the transferer is not released from liability until the transfer is registered on the corporate books,[10] but if the corporation accepts the transferee as a stockholder, and pays dividends, or if, through the negligence or fault of the corporation, no transfer on the books is made, the transferer is released; and in such case the transferee only is liable on the stock, although it still stands on the books in the name of the transferer.[11] Where, however, the vendor is held liable for instalments on subscriptions or claims of corporate creditors accruing after

(3) Willis *v.* Phila. & Darby R. R. Co., 6 W. N. C., 461 (1878).

(4) Robert's Appeal, 85 Pa., 84 (1877).

(5) German Union Bldg. & S. F. Assn. *v.* Sendemeyer, 50 Pa., 67 (1865).

(6) O'Donnell *v.* Gaffney, 22 Pa. Super. Ct., 316 (1903); Com. *v.* Crompton, 26 W. N. C., 475 (1890).

(7) Bank of Commerce's Appeal, 73 Pa., 59 (1873).

(8) Finney's Appeal, 59 Pa., 398 (1868).

(9) Com. *v.* Watmaugh, 6 Whart., 117 (1840); Finney's Appeal, 59 Pa., 398 (1868); U. S. *v.* Vaughan, 3 Binn. 394 (1811); Oerther *v.* First Nat. Bank, 1 Leg. Rec. R., 69 (1877).

(10) Miller *v.* Peabody Bank, 15 W. N. C., 76 (1883); Cook on Corpns., Sec. 258. See Sec. 328, as to liability for calls becoming due after transfer.

(11) Chambersburg Ins. Co. *v.* Smith, 11 Pa., 120 (1849).

transfer and before registry thereof, he may recover the amount which he has been required to pay from the vendee, and in such case he may have recourse to the real, and not to the nominal, transferee.[12]

The Act of April 29, 1874, provides that shares of corporations formed under it shall be transferable on the books of the company "subject to such regulations as the by-laws may prescribe." The by-laws of such a company prescribed that no transfer should be made while the books were closed. Where a stockholder sold his stock and sent his certificates to the office of the company for transfer while the books were closed, and subsequently and before the books were opened, and the transfer remaining unrecorded, the corporation became insolvent, held, that the stockholder remained liable for the unpaid amount of his subscription to the stock.[12*]

The assignee of shares which have not been transferred to him on the books of the corporation is entitled to hold them as against a subsequent execution creditor of the assignor.[12**]

The transferee is entitled to all the dividends on the stock declared after the sale thereof, even though the transfer has not been recorded,[13] though, until a corporation receives notice of an assignment, it is bound to pay dividends to the parties who appear by the stock book to be the owners of the shares;[14] but after notice of a transfer the corporation must pay the dividend to the transferee, although no registry has been made.[15] When the vendor of shares, after the sale and before transfer on the books collects dividends on the shares, he is liable to his vendee for the amount thereof.[15*]

The holder of certificates of stock in a corporation, which were delivered to him with powers of attorney, signed in blank by the owner, as collateral security, but which stock was not transferred on the books of the company, cannot recover from the trustee of the company the amount of a dividend of its assets

(12) Cook on Corpns., Sec. 262.

(12*) Cook *v.* Carpenter, (No. 2); McCord's Appeal, 212 Pa., 177 (1905).

(12**) Oerther *v.* First Nat. Bank, 1 Leg. Rec. R., 69 (1877).

(13) Cook on Corpns., Sec. 539.

(14) Bell *v.* Lafferty, 1 Penny., 454 (1881); Bank of Commerce's Appeal, 73 Pa., 59 (1873).

(15) Cook on Corpns., Sec. 538.

(15*) Steinmetz *v.* Groetzinger, 21 Lanc. L. R., 124 (1903).

paid *bona fide* and without notice to a third party, who produced a later assignment of the dividend from the owner, without the certificates.[16]

Where shares of stock have been assigned, but not transferred upon the books of the company, there is an implied contract on the part of the assignee to reimburse the assignor for moneys paid by him on calls made on the stock during the time he remained the nominal owner.[16*]

327. When Transfer is Made Without Delivery of the Certificates.

It is the duty of the corporation not to make a transfer of stock upon the books and issue new certificates therefor, without requiring the surrender of the old certificates, and where it does not require the surrender of the old certificates, on making a transfer, it is responsible to a *bona fide* purchaser for value, without notice, of the old certificates, except in cases where the corporation has been compelled to make the registry by legal proceedings.[17] The remedy of the transferee of stock without certificates is against the corporation, and not against the holder of the old certificates.[18]

328. Liability for Calls Becoming Due After Transfer.

Under early charters and under Sec. 7 of the General Railroad Act of February 19, 1849, it was held that the liability of a subscriber on his subscription remained after a transfer of his stock, and that the transferee was not liable for the payment of unpaid instalments of the stock, though the stock itself might be forfeited for non-payment thereof. It is now held that, under the provisions of the Act of April 29, 1874, a *bona fide* assignment of shares of stock in a solvent corporation formed under the provisions of said act and those of its supplements relieves the subscriber to such shares from liability on account of instalments to become due thereon, and subjects the transferee to liability on such account, the transferee succeeding to the rights and liabilities of the transferer.[19] [20] The law, however, is not as firmly settled as it

(16) Bell *v.* Lafferty, 1 Penny., 454 (1881).

(16*) Lichten *v.* Verner, 8 D. R., 218 (1899).

(17) Cook on Corpns., Sec. 359.

(18) Cook on Corpns., Sec. 360.

(19) Bell's Appeal, 115 Pa., 88 (1886). Bunn's Appeal, Lane's Appeal, 105 Pa., 49 (1884); Finletter *v.* Acetylene Lt. Co., 215 Pa., 86 (1906).

(20) Reimer Harrow Co. *v.* Rosenberger, 40 Leg. Int., 146-383 (1883); 16 Phila., 191.

might be, and a resumé of all the decisions upon the subject is given in the note.[21]

(21) In President etc. Del. & Schuylkill Nav. Co. *v.* Sansom, 1 Binn., 70 (1803), it was held that the company could recover the amount due by a subscriber on his subscription, notwithstanding a provision in the charter that when the penalty for non-payment of calls should equal the amount paid in, the shares should be forfeited; otherwise, as to shares held by the defendant as transferee, the charter making no other provision in such case than that the *shares* should be subject to payment.

In the case of West Phila. Canal Co. *v.* Innes, 3 Whart., 205 (1837) the act of incorporation provided that "the certificate or evidence of stock shall be transferable at his, the stockholder's, pleasure in person or by attorney . . . . subject, however, to all payments due or to become due thereon." The assignee is to be "subject to all the penalties and forfeitures and to be sued for all balances and penalties due on such shares as the original subscriber would have been." The Court said in this case: "Whether an original stockholder in the company who became such by having subscribed for the stock, remains liable to pay the amount thereof . . . . he having previously to such requisition transferred his stock, is a question which does not arise here and therefore need not be determined. An assignee, however, cannot be held for any assessment made on the stock after *he* assigned it."

A transferee from a subscriber may relieve himself from the unpaid instalments to the corporation by a transfer on the books, accepted by the corporation, but not an original subscriber. Aultman's Appeal, 98 Pa., 505 (1881). As the preceding cases had been uniform in holding that the transferee from the original subscriber was not liable for unpaid instalments, in any event, it is conceivable that he would not be liable after he had transferred his stock to a second transferee. This case involving an Ohio corporation does not, of course, construe the Act of 1874 in this regard.

Bunn's Appeal and Lane's Appeal, 105 Pa., 49 (1884) were appeals from a decree on a creditor's bill fixing the liability of appellants as stockholders in an insolvent corporation. "It was admitted however, that by the 7th Section of the Act of 1874 an assignee of stock is subject to the same liabilities as an original subscriber. . . . To determine what are the liabilities of assignees since this act, we have simply to inquire what are the liabilities of subscribers. We have already shown that among the liabilities of subscribers is the obligation to pay the unpaid portion of the capital stock. This liability exists outside of the Act of 1874, and of all legislation, and of course attaches to assignees, because their possession is the same as that of subscribers."

In Bell's Appeal, 115 Pa., 89 (1886) the assignment of the appellant on the strength of which he sought to avoid responsibility for unpaid instalments on his stock was held to be fraudulent, so that the question whether or not a subscriber to stock is relieved from liability for unpaid instalments thereon by a *bona fide* transfer was not before the Court. The Court

Where an act under which a corporation is chartered provides that shares shall be transferable on the books of the company "subject to such regulations as the by-laws may prescribe," and the by-laws provide that no transfer shall be made while the books are closed, a stockholder who sells his stock at public auction while the books are closed and because of the same being closed

say, however: "The Court held [referring to Messersmith *v.* Sharon Savings Bank, 96 Pa., 440 (1880)] that a transferee in good faith and upon the agreement to pay subsequent calls was not bound to pay them, and a single remark in the opinion of this Court seems to countenance that idea. It is true that such is the law as declared in several decisions of this Court, but they were decisions arising upon charters, or by-laws, providing for only a particular remedy in case of non-payment of instalments, such as the forfeiture and sale of the stock itself in case of default. . . . There is also another class of cases in which the same rule as to liability of original stockholders is held, notwithstanding they have transferred their shares. They are cases of subscription to the stock of railroad companies subject to the general railroad law of February 19, 1849, the seventh section of which provides that no transfer shall have the effect of discharging any liabilities incurred by the owners thereof. . . . Subject to such exceptional instances as these, it cannot be doubted that the obligation to make good the unpaid portions of capital stock, when the necessities of creditors require it, is a charge upon the stock which passes with it to the holders of it."

Palmer *v.* The Ridge Mining Company, 34 Pa., 288 (1859) following President etc. *v.* Sansom, 1 Binn., 70, supra, holds that, under a by-law providing similarly to the charter in said case, the company had recourse only against the stock and not against the transferee personally. "As between the parties making and receiving the transfer there might possibly be a contract to pay calls, but there is none with the company unless the act of incorporation requires."

Merrimac Mining Co. *v.* Levy, 54 Pa., 227 (1867) was an action against the transferee of stock of a Michigan corporation, whose stock had been sold for non-payment of calls and an action brought to recover the difference between the amount received for the stock and the amount due upon calls. The Court in this case criticises the decisions in 1 Binn. and 34 Pa., supra, and says, *arguendo*: "But if the original subscriber is personally liable on his subscription for instalments called while he holds his stock, it is hard to see why a purchaser from him is not bound to pay instalments called for after he has succeeded to the place of his vendor. It would seem he must be substituted to the obligations of the original subscriber as well as to his rights."

The case of Franks Oil Company *v.* McCleary, 63 Pa., 317 (1869) related to a corporation formed under the General Mfg. Act of July 18, 1863. This follows Palmer *v.* Ridge Mining Co., supra. "The case of Merrimac Mining Co. *v.* Levy, 54 Pa., 227, is not in conflict with these views. We decided that case on a Michigan charter, and considered ourselves

does not get the stock transferred to the purchaser, the company meanwhile becoming insolvent, is not relieved from liability for the unpaid amount due on the original subscription to the stock.[21*]

Original subscribers to the shares of railroad companies are, apparently, still liable for instalments due or to become due upon the stock subscribed for by them, after transfer, and the transferees of such stock are not liable to the company issuing the same for such instalments.[22]

bound by the decisions of their Supreme Court. 'Otherwise,' we said, 'some stockholders will be bound to pay instalments called, and others standing in the same position will not, depending upon the forum administering the law in or out of the State.'"

Pgh. & Balti. Coal, Coke & Iron Co. *v.* Ottison, 4 W. N. C., 545 (1877) was an action against a transferer of stock, for calls, the transferee having expressly agreed to take the stock subject to unpaid instalments and to pay the same as they fell due. Held, following the preceding cases, that the transferee was not liable to the company. In such case he would, of course, be liable to the transferer. Bailey *v.* Stroyer, 1 Atl., 717 (1885); Trevor *v.* Perkins, 5 Whart., 244 (1839).

Messersmith *v.* Sharon Savings Bank, 96 Pa., 440 (1880) was an action to recover an assessment from an original subscriber after transfer of his stock, and it was held that he was liable because under the foregoing decisions the transferee was not.

In Citizens' & Miners' S. Bank & T. Co. *v.* Gillespie, 115 Pa., 564 (1887) the question whether the transferee was liable, as such, for calls did not arise, inasmuch as he had expressly made himself liable, by an agreement, as an original subscriber.

In Reimer Harrow Co. *v.* Rosenberger, 40 Leg. Int., 382 (1883); 16 Phila., 191, the Court examines the 7th, 11th and 12th sections of the Act of April 29, 1874, and concludes: "It appears to us that the language of the act leaves no escape from the conclusion that the assignee of the stock is to be liable for assessments made while he is the holder, in the same manner as the original subscriber or holder would have been if he had not parted with his stock."

Section 7 of the General Railroad Act of February 19, 1849, provides that all transfers shall be made subject to all payments due or to become due thereon, and that no such transfer of stock shall have the effect of discharging any liabilities or penalties theretofore incurred. Under this section the Court held that an original subscriber was not relieved from liability after a transfer of his stock; Pgh. & Connellsville R. R. Co., *v.* Clarke, 29 Pa., 146 (1857); Graff *v.* Pgh. & Steubenville R. R. Co., 31 Pa., 489 (1858), though there was a divided court upon the point in Everhart *v.* Phila. & W. Chester R. R. Co., 28 Pa., 339 (1857).

(21*) Cook *v.* Carpenter (No. 2); McCord's Appeal, 212 Pa., 177 (1905).

(22) Pgh. & Connellsville R. R. Co. *v.* Clarke, 29 Pa., 146 (1857); Graff *v.* Pgh. & Steubenville R. R. Co., 31 Pa., 489 (1858); Everhart *v.* Phila. & W. Chester R. R. Co., 28 Pa., 339 (1857).

329. Transfer of Shares in Insolvent or Failing Corporations.

Shares in an insolvent corporation may not be transferred, even with the consent of the officers of the corporation.[23] And a transfer of shares in a failing corporation, made by the transferer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to creditors of the company and as to other shareholders, although as between the transferer and the transferee the transfer may be valid and binding.[24]

330. Corporations Trustees for Their Stockholders.

A corporation is a trustee of the capital of all its shareholders, and if it illegally cancels and destroys certificates of stock, relying upon forged powers of attorney, it may be compelled by a court of equity to issue to the owners of the certificates other certificates for an equal amount of stock.[25]

A corporation is the trustee of its stockholders and bound to use proper care that unauthorized transfers may not be made. Where signatures of powers of attorney were genuine, but such powers had been executed seventeen years before the application for transfer, the company was not justified in making the transfer without ascertaining if the powers had been revoked.[26]

331. Refusals to Make Transfers.

A refusal to permit a transfer, under proper circumstances, is a tort, the remedy for which was formerly a special action on the case and now, under the practice act, an action of trespass.[27]

It seems that mandamus is the proper remedy by a purchaser of stock to compel a transfer of the same on the books of the corporation.[28] In an early case, however, it was held that mandamus

(23) Messersmith *v.* Sharon Savings Bank, 96 Pa., 440 (1880); Aultman's Appeal, 98 Pa., 505 (1881).

(24) Burt *v.* Real Estate Exchange of Phila., 175 Pa., 619 (1896).

(25) Pa. Co. for Ins. on Lives, etc. *v.* Franklin Fire Ins. Co., 181 Pa. 40 (1897); 40 W. N. C., 145.

(26) Pa. R. R. Co.'s Appeal, 86 Pa., 80 (1878).

(27) Morgan *v.* Bank of North America, 8 S. & R., 73 (1822); German Bld. Assn. *v.* Sendmeyer, 50 Pa., 67 (1865); Telford & Franconia Tpk. Co. *v.* Gerhab, 13 Atl., 90 (1888).

(28) Sproul *v.* Standard Plate Glass Co., 201 Pa., 103 (1902).

to compel a transfer on the books will not lie where an action on the case for damages will furnish full redress.[28*]

Equity will not ordinarily decree a transfer upon the books,[29] but, where the stocks which it is sought to have transferred have no market value, they do not come within the rule which excludes the jurisdiction of equity over personal contracts.[30]

And where stock has been placed by the owner in the hands of another, under an agreement that he shall transfer it to a third person, a preliminary injunction will be granted when there is a dispute as to the ownership of the stock, to prevent the holder from delivering back the stock to the assignor, pending a final determination of the case.[31]

The measure of damages for a wrongful refusal to permit a transfer is the actual value of the stock at the time the transfer is refused.[32] Where the company has made an improper transfer, the measure of damages is the market value of the stock at the date of the demand for transfer, or, where no demand is made, then at the date of bringing suit.[33]

When stock has been issued to directors for services, without prior authority for payment of compensation therefor, a person taking the stock with full knowledge of the transaction is not a bona fide purchaser for value without notice, and he cannot compel the corporation to transfer the stock to himself.[34]

The fact that a corporation refuses to permit a transfer of shares of stock on its books, is no ground upon which the purchaser of such shares, after payment of consideration and delivery of certificates therefor, may rescind the contract of sale.[34*]

332. Prohibition of Transfer of Shares When Owner is Indebted to the Corporation Issuing the Same.

So much of the seventh section of the Act of April 29, 1874, P.

(28*) Birmingham Fire Ins. Co. *v.* Com., 92 Pa., 72 (1879); Curry *v.* Scott, 54 Pa., 270 (1867).

(29) Clark *v.* Miners' & L. Assn., 1 Leg. Rec., 337 (1882). See, however, Wadlinger *v.* First Nat. Bank, 209 Pa., 197 (1904).

(30) Sank *v.* Union Steamship Co., 5 Phila., 499 (1864).

(31) Norristown Traction Co. *v.* Slingluff, 7 Montg. Co., 83 (1891).

(32) German Union Bldg. & S. F. Assn. *v.* Sendmeyer, 50 Pa., 67 (1865).

(33) Willis *v.* Phila. & Darby R. R. Co., 6 W. N. C., 461 (1879).

(34) Grafner *v.* Pgh. N. I. & C. St. Ry. Co., 207 Pa., 217 (1903).

(34*) Ritchey *v.* McCausland, 51 Pitts. L. J., 259 (1904).

L., 78, as provides that "No certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of directors shall consent thereto" is repealed by the Act of June 24, 1895, P. L., 258, which supersedes, though it does not amend, said section. The said Act of 1895 is applicable to all corporations incorporated under the laws of the Commonwealth, and not to those only which are formed under the Act of 1874. It is to be observed, however, that shares may not be transferred "until all previous calls thereon shall have been fully paid in, or shall have been declared forfeited for the non-payment of calls thereon." [35]

It has not been decided whether the shares of stock in a railroad company, owned by a person indebted to the company issuing the shares, may be transferred, since the passage of the Act of June 24, 1895, P. L., 258, such transfer being forbidden by Sec. 7 of the Act of February 19, 1849, but it is to be presumed that they may be.

There is no such thing as a common law lien on stock in favor of the corporation issuing it for a debt due it by a stockholder,[36] but such lien may be given by charter or by-laws made under authority contained in the charter,[37] or even by usage, so far as to bind the stockholder himself and his assignees under a voluntary assignment.[38]

Secs. 7 and 12 of the Act of April 29, 1874, prohibit the transfer of shares of stock so long as the proposed transferer is indebted to the company on any account whatever, without the consent of the directors, and not merely where he is indebted to the company upon calls made upon such shares. And a company is not estopped from refusing to transfer shares of stock owned by a stockholder indebted to the company, by a form of stock certificate which sets forth that the shares are "transferable personally or by attorney on the books of the company." The language of the certificate is not a representation of inherent quali-

(35) Sproul *v.* Standard Plate Glass Co., 201 Pa., 103 (1902); Act of June 26, 1895, P. L., 369. See Sec. 235.

(36) Steamship Dock Co. *v.* Heron, 52 Pa., 280 (1866); Merchants' Bank of Easton *v.* Shouse, 102 Pa., 488 (1883).

(37) Geyer *v.* Western Ins. Co., 3 Pitts., 41 (1867).

(38) Morgan *v.* Bank of North America, 8 S. & R., 73 (1822).

ties of the shares or rights of the holders, but is merely information as to the method of transfer.[39]

A claim by a corporation on the stock of one of its shareholders who, as an officer, had embezzled the funds of the company, was held to be such a debt to the company as was contemplated by Sec. 7 of the Act of April 29, 1874, which provided that certificates of stock should not be transferred so long as the holder was indebted to the company, etc.[40]

A stockholder in a bank incorporated under the Act of March 21, 1813, which provides that "no stockholder indebted to the institution shall be authorized to make a transfer" may not transfer his stock while indebted to the institution on a note discounted in the ordinary way. Where a stockholder who was indebted to a bank on a discounted note and also for an instalment due upon his shares, gave a power of attorney to receive the dividends in his own name, and at the same time another power of attorney to transfer his stock to the plaintiffs, who placed in the hands of the attorney a sum of money to pay the instalment, and the attorney, after depositing the money to his own credit, paid the instalment due on the stock by cheque on such money, no notice having been given the bank of the power to transfer the stock until some months afterwards, held, that the plaintiffs were not entitled either to a transfer of the stock or a return of their money.[41]

Under the Bank Act of 1814 banks have a lien on stock, though levied on by a judgment creditor, for notes drawn before the levy but falling due after the same, even though renewed. On a sale of stock in a bank on execution, the record is the evidence of the vendee's title. If a debtor to a bank which has a lien on his stock owes less than the value of it, the bank may hold the whole until that debt is paid; it is not obliged to appropriate part and transfer the rest.[42]

The Bank Act of April 16, 1850, prohibiting the transfer of

(39) Nat. Bank of the Republic *v.* Rochester Tumbler Co., 172 Pa., 614 (1896). The cause of action arose in this case before the passage of the Act of June 24, 1895, P. L., 258; Winans *v.* Sanderson Oil & S. Co., 7 Lack. L. N., 9 (1900).

(40) Sproul *v.* Standard Plate Glass Co., 201 Pa., 103 (1902).

(41) Rogers *v.* Huntington Bank, 12 S. & R., 77 (1824).

(42) Sewall *v.* The Lancaster Bank, 17 S. & R., 285 (1828); Grant *v.* Mechanics' Bank, 15 S. & R., 140 (1826).

bank stock, or the receipt of dividends thereon, by any stockholder who may, at the time, be indebted to the bank, though intended mainly for the security of the bank, operates also, incidentally, in favor of the endorsers of such debtors. The right of the bank to prevent such transfer or payment becomes absolute as soon as any such debt becomes due and payable, and the legal title remains in the bank for its own security until payment, and for the benefit of the sureties of a debtor, if there be any, afterwards. The sureties of such indebted stockholder are, in equity, entitled to be subrogated to the security thus held by the bank, which equitable right attaches the instant the lien of the bank commences, and is consummated by the payment of the debt for which they were surety.[43]

Where the treasurer of a corporation, who is also a stockholder, defaults, the directors, in the interest of the company, may allow him time and opportunity to withdraw gradually from the illegal ventures and reduce his debt; and in reaching such decision they are not bound to take notice of danger to his other creditors, or to prefer such interests to their own; and in so doing they do not imperil the lien which the corporation has upon the treasurer's stock.[44]

A stockholder whose estate was insolvent died indebted to the corporation issuing the stock. After his death, the directors passed a resolution prohibiting the transfer of stock by any one indebted to the company. His administratrix afterwards sold the stock, the purchaser having no notice of the resolution. Held, that there is no lien on stock for debts in favor of the corporation issuing the same, unless created by a statute or by by-laws passed under authority granted thereby, and that the company was bound to permit a transfer of the stock,[46]

The General Railroad Act of February 19, 1849, provides that the assignee of stock shall be a member of said corporation, and be subject to all the liabilities incident thereto in the same manner as the original subscriber would have been, *"Provided,* That no certificate shall be transferred so long as the holder thereof is indebted to said company, unless the board of direc-

(43) Klopp & Stump *v.* Lebanon Bank, 46 Pa., 88 (1863).

(44) National Bank of the Repub. *v.* Rochester Tumbler Co., 172 Pa., 614 (1896).

(46) Steamship Dock Co. *v.* Heron's Admx., 52 Pa., 280 (1866).

tors shall consent thereto; and provided, that no such transfer of stock shall have the effect of discharging any liabilities or penalties theretofore incurred by the owner thereof." Held, that an original subscriber who has not paid the full value of the stock for which he subscribed is "indebted to the company" and hence can make no valid transfer of the stock without the consent of the board of directors. Where such consent is required by by-law only, it may be waived where a contrary practice is shown, but where the requirement is contained in the charter, it must be complied with or the transfer will be void. "Neither the creation of a lien on the stock transferred, nor the personal liability imposed on the assignee, can have the effect of releasing an original subscriber from his express contract to pay the money." [47]

333. Transfers of Stock Held in Trust.

All certificates of stocks and loans which have been or may hereafter be issued by this Commonwealth, or by any municipal or other corporation, shall be transferable by the legal owner thereof, without any liability on the part of the transfer agents of the Commonwealth, or the municipal or other corporation permitting such transfers, to recognize or see to the execution of any trust, whether expressed, implied or constructive, to which such stocks or loans may be subject, unless when such transfer agents of the Commonwealth, or officers of such municipal or other corporation, charged with the duty of permitting such transfer to be made, shall have previously received actual notice in writing, signed by or on behalf of the person or persons for whom such stocks or loans appear by the certificate thereof, to be held in trust that the proposed transfer would be a violation of such trust.[48]

In Bayard *v.* Farmers' & Mechanics' Bank of Philadelphia, 52 Pa., 232 (1866), it was held that while administrators and executors may be allowed by corporations to transfer shares of stock belonging to their estates, without an inquiry as to their right to make the transfer or the propriety of so doing, a trustee stood in a different light, and that a corporation was justified in not permitting him to transfer stock without exhibiting to the

(47) Pgh. & Connellsville R. R. Co. *v.* Clarke, 29 Pa., 146 (1857).
(48) Act of May 23, 1874, P. L., 222.

company issuing the same authority to transfer further than the certificate.[49] This decision presumably led to the passage of the Act of 1874 cited above. Corporations are, therefore, *not liable* for transfers of shares held in trust, unless notified in writing by the *cestuis que trustent* that the proposed transfer will be in violation of the trust, but this does not prevent them, apparently, from inquiring into the nature of the trust, and refusing to make the transfer, if the same is in violation of the terms thereof.[50]

334. Transfers of Shares of Stock Belonging to Estates.[51]

It shall and may be lawful for any executor, administrator or other person representing the estate of any decedent, or for any guardian or other legal representative of the estate of a minor, acting under letters testamentary or of administration, or other authority, granted by or under the laws of any other State or Territory of the United States, or of any kingdom, state, sovereignty or country, to transfer any or all shares of stock and registered loan, or either, of any incorporated company of this Commonwealth standing in the name of any decedent minor, or *cestui que trust,* and to receive the dividends and interest, or either thereof, whenever a duly authenticated copy of the will or other grant of authority under which such transfer or receipt is proposed to be made, shall have been filed in the office of the register of wills for the county in which such incorporated company has its transfer office or principal place of business; and all transfers of stock or loans or receipts for dividends or interest, heretofore made by foreign executor, administrator, guardian and others acting as aforesaid are hereby validated.[52]

The Act of March 15, 1832, P. L., 135, Sec. 6, restricted administration of goods within this Commonwealth to persons appointed here by providing that no letters testamentary or of administration granted out of this Commonwealth shall confer any of the powers and authorities possessed by an executor or administrator under letters granted within this State. But, to furnish the means of administering the estates of citizens of any

(49) Compare Larkin's Appeal, 38 Pa., 457 (1861).

(50) Livezey *v.* Northern Pacific R. R. Co., 157 Pa., 75 (1893); 33 W. N. C., 126.

(51) See preceding section.

(52) Act April 8, 1872, P. L., 44.

other State or country, it was provided in the same act, by Sec. 12, that copies of wills and testaments proved in any other State or country according to the laws thereof and duly authenticated, and of the letters testamentary or other authority to administer issued thereon, duly attested, shall be deemed sufficient proof for granting letters testamentary or of administration with the will annexed in this State. By Sec. 19 the executor of an executor is not the executor of the first testator.

The Act of 1832 as amended by the Act of June 13, 1836, P. L., 682, Sec. 3, provides that the provisions of Sec. 6 of said Act of 1832, supra, shall not apply to shares of stock in any bank or other incorporated company within this Commonwealth, but such shares shall pass and be transferable, and the dividends thereon be receivable, in like manner and under the same regulations, powers and authorities as was used and practiced with the loans or public debt of the United States and of this Commonwealth, before the said recited acts were passed, unless the by-laws, rules and regulations of any such bank or corporation shall otherwise provide or declare.

In 1872 the Supreme Court decided in Alfonso's Appeal, 70 Pa., 347 (1872), that executors acting under authority conferred by a foreign country could not transfer stock, but that those appointed by a sister State might. This led to the passage of the Act of April 8, 1872, P. L., 44, given above.[53]

Where the executors of a surviving trustee, which executors, under the law of Georgia, in which State the trust was created by will, succeeded to the execution of a trust, applied to have certain shares of stock belonging to the trust transferred to their names, it was held, that before a decree ordering such transfer to be made should issue, notice should be given to the *cestuis que trustent,* and that copies of the will and letters testamentary to the executors should be filed.[54]

An executrix of an executrix of an English citizen dying resident in England is entitled to transfer stock of a corporation of

(53) Grimes *v.* Penna. R. R. Co., 189 Pa., 619 (1899). Other acts qualifying the Act of 1832, *as to loans,* are: Mch. 12, 1842, P. L., 67, Sec. 5; May 15, 1850, P. L., 767, sec. 8; May 15, 1874, P. L., 195.

(54) Appeal of Lehigh Coal & Nav. Co., 88 Pa., 499 (1879); 7 W. N. C., 106.

this Commonwealth, without any grant to her of letters of administration *de bonis non,* either in England or Pennsylvania.[55]

A corporation is not liable in damages for refusing to transfer stock held in the name of a decedent, where the right of the executors to sell the stock is doubtful, or where the executors have impeached their own right to make the transfer.[56]

Executors applied to a corporation for a transfer of stock therein to their vendee. Counsel for the corporation, on examination of the will, advised that executors had no power to sell stock, but were bound to hold the same as trustees for purposes designated in the will. By *ex parte* proceedings in Orphans' Court, executors procured an order authorizing them to sell. The corporation still refused to make the transfer. Later a son of the testator, of exactly the same name, claimed the stock as his own. The executors assented to this claim. The corporation refused to issue new certificates to the son, but did issue the same to the executors, seven months after the original demand. Held, that the corporation was not liable for depreciation in value of the stock during that time.[57]

The law casts no duty upon a purchaser to ascertain if the trusted executor of a decedent's will is mismanaging the estate in fraud of creditors or legatees.[58]

335. Conversion of Shares by Bailees, Pledgees and Others.

Where the owner of stock entrusts the certificates, with blank powers of attorney, to an agent for safe keeping, who fraudulently transfers them to a third person, who buys them without knowledge of the fraud, and for a valuable consideration, and has them transferred to himself, the owner cannot recover from the corporation for the loss.[59]

Where one has conferred upon another by a written transfer all indicia of ownership, he is estopped to assert title to it as against a third person who has, in good faith, purchased it for

(55) Grimes *v.* Penna. R. R. Co., 189 Pa., 619 (1899).

(56) Livezey *v.* Northern Pacific R. R. Co., 157 Pa., 75 (1893); 33 W. N. C., 126.

(57) Livezey *v.* Northern Pacific R. R. Co., 157 Pa., 75 (1893); 33 W. N. C., 126.

(58) Wood's Appeal, 92 Pa., 379 (1880).

(59) Pa. R. R. Co.'s Appeal, 86 Pa., 80 (1878); Shattuck *v.* Amer. Cement Co., 205 Pa., 197 (1903).

value from the apparent owner.[60] The same principle applies to the case of an executor who invests the holder of certificates of stock with apparent ownership as applies in the case of an absolute owner.[61]

A certificate with an assignment in blank, with an irrevocable power of attorney is, when held by a third person, evidence of ownership; and such title, when based upon value and without notice of intervening rights, cannot successfully be attacked;[62] but this rule does not obtain where there are circumstances to put such third person upon inquiry.[63]

"A certificate of stock with a power of attorney to transfer, duly executed but in blank as to date and name of transferee, is in the position of merchandise prepared for market. That is the way sales and transfers of stock are usually made, and the presumable intent of executing the power to transfer, is to put the holder in position to complete a sale by delivery of the certificate and transfer of the stock. Such transfer carries *prima facie* a good title. The business of a stockholder is to buy and sell stock, and when a certificate and power to transfer are put into a broker's hands, the situation is exactly analogous to that of goods or merchandise of any kind, prepared for market, and put into the hands of a dealer in that particular article. The presumption which would arise in the case of an ordinary agent or holder is reinforced by the nature of this particular agent's business." [63*]

"The right of a bona fide holder as against the true owner of the stock, to whom the apparent holder has either sold or pledged, does not depend on the negotiable character of the certificates, but rests on another principle, namely: 'That one who has conferred upon another by a written transfer all the indicia of ownership

(60) Wood's Appeal, 92 Pa., 379, (1880); Burton's Appeal, 93 Pa., 214 (1880); West Branch Co.'s Appeal, 81* Pa., 19 (1890); Gilbert *v.* Erie Bldg. Assn., 184 Pa., 554 (1898); Bank of Ky. *v.* Schuylkill Bank, 1 Pars. Eq., 248.

(61) Wood's Appeal, 92 Pa., 379 (1880).

(62) Souder *v.* Columbia Nat. Bank, 156 Pa., 374 (1893); citing Finney's Appeal, 59 Pa., 400; Com. *v.* Watmough, 6 Whart., 117; German Union Bldg. & S. F. Assn. *v.* Sendmeyer, 50 Pa., 67 (1865).

(63) Ryman *v.* Gerlach, 153 Pa., 197 (1893); Westinghouse *v.* German Nat. Bank, 188 Pa., 630; Davis *v.* American Bank, 1 Mona., 321 (1888); Kerns' Estate, 176 Pa., 373 (1896); Ellis' Ap., 8 W. N. C., 538 (1880).

(63*) Dissenting Op. of Mitchell, J., in Ryman *v.* Gerlach, 153 Pa., 197, adopted in Shattuck *v.* Amer. Cement Co., 205 Pa., 197 (1903).

of property is estopped to assert title to it as against a third person, who has in good faith purchased it for value from the apparent owner.' " [63**]

When, on the face of a certificate of stock, absolute ownership appears in him who is in possession of it, and there is no evidence outside showing actual or constructive notice that the ownership is in another, the party taking such certificate for value takes title thereto. Where loss results, the owner who puts it in the power of another to deal with the instrument, as his own, must bear the loss. Where an owner of stock executes a transfer in blank and gives it to his broker as collateral, and the broker has a new certificate issued in his own name which he pledges to one who has no knowledge of the real ownership, the pledgee may retain the stock as against the late owner.[64]

The rule, that, where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to perpetrate the fraud, does not apply where a son, by forging his father's name to a power of attorney, secures a transfer of stock; where the only failure of duty alleged is, that the stockholder entrusted the key of the box, in which the certificates of stock were kept, to his son.[65]

The owner of certain shares of stock endorsed upon them blank assignments and powers of attorney and, dying, bequeathed them to his wife, but his son purloined them and pledged them at a bank as collateral for a loan. The president of the bank had notice of the death of the original owner, but made no inquiries when the shares were offered as a pledge. Held, that these facts were sufficient to put the bank on inquiry, and that the failure to inquire constituted a legal fraud, which entitled the widow to recover the shares in a bill in equity.[66]

And where B obtained a certificate of stock with blank power of attorney from A, by fraudulent pretences, and pledged the stock to C as collateral for a pre-existing debt, in consideration of C's agreement to accept promissory notes for the debt and to

(63**) Shattuck *v.* Amer. Cement Co., 205 Pa., 197 (1903).

(64) Westinghouse *v.* German Nat. Bank, 196 Pa., 249 (1900).

(65) Pa. Co. for Ins. on Lives, etc. *v.* Franklin Fire Ins. Co., 181 Pa., 40 (1897).

(66) Davis *v.* American Bank, 1 Mona., 321 (1888).

forbear suit until maturity, held, in a bill in equity filed by A to compel the return of the stock, that the pledge to C was not such a purchase for value as would cure the defect in his title, or preclude A from reclaiming his stock on the ground of fraud in its transfer.[67]

Where a person assigns stock with a general power of attorney with the understanding that the assignee shall use the stock as collateral in stock speculation for the joint account of assignor and assignee, the assignee giving a receipt for the stock and agreeing to return it on demand, and the assignee sells the stock and loses the proceeds in speculation on the joint account, there was no tortious conversion by the assignee and an action of trover for the stock will not lie against him.[67*]

336. Powers of Attorney to Transfer—Attorneys.

The death of the principal works a revocation of a simple power of attorney to transfer stocks,[68] but not when the power is coupled with an interest;[69] and where a sale of stock had been effected by a principal, it was held that his death did not revoke a power given by him to transfer the stock so sold.[70] The powers of a substitute of an attorney cease upon the death of such attorney.[71]

A guaranty of a signature upon a power of attorney to transfer stock implies a promise upon the part of the guarantor to be responsible to any person purchasing the certificate and power, or making a transfer of it, but if the guarantor has been deceived and the signature is a forgery, the implied promise is broken as soon as made.[72]

A bank issued to a customer a certificate of its stock based on a forged power of attorney to transfer. The customer delivered the certificate to brokers as collateral, and the brokers had the same transferred to their own name. The customer becoming

(67) Linnard's Appeal, 21 W. N. C., 40 (1886).

(67*) Martin *v.* Megargee, 212 Pa., 558 (1905); Duffield et al. *v.* Miller, 92 Pa., 286 (1880).

(68) Kerns' Estate. Gilpin's Appeal, 176 Pa., 373 (1896).

(69) Lightner's Appeal, 82 Pa., 301 (1876).

(70) Fisher *v.* N. Y. & Middle Coal Field R. Co., 31 W. N. C., 502 (1892).

(71) Lehigh Nav. Co. *v.* Mohr, 83 Pa., 229 (1887); 3 W. N. C., 322.

(72) Lehigh Coal & Nav. Co. *v.* Blakeslee, 20 Pa. C. C., 289 (1898).

insolvent, the bank, plaintiff in the case, having notes of his not fully secured, asked defendants if they had notes of the customer, secured by collateral, in excess of the amount of the notes. Defendants replying affirmatively, plaintiff bought from defendants the said notes, with aforesaid certificate of stock as collateral. The forgery being discovered, the plaintiff had to pay the real owner of the stock. Held, that plaintiff could not recover from the brokers.[73]

Where stock is wrongfully transferred under a forged power of attorney, it seems that the measure of damages in an action against the company is, the market value of the stock at the time of the transfer.[74]

An attorney in fact, acting under a general power of attorney for the sale of corporation stock, is not authorized to sell the same in part or full payment of his individual indebtedness, without the knowledge, precedent authority or subsequent ratification of his principal.[75]

A debtor, owning stock, delivered the certificates therefor, with a power of attorney to transfer to a creditor, as collateral security. Held, that in a contest with another creditor the purchaser may show by parol that the date in the power of attorney was a clerical error, and that the power had been executed on a different time from its date; that the debtor was a competent witness to prove the mistake, and that the title to the stock passed to the creditor at the time of the delivery of the certificate and power of attorney, though it continued to stand on the books of the company in the debtor's name.[76]

A corporation is not justified in transferring stock on the books upon authority of a blank power of attorney signed by the owner many years previously, without making due inquiry as to whether the power had been revoked, but where, in such case, the owner of the stock had entrusted the certificates with blank powers of attorney to transfer the same to an agent for safe

(73) Phila. Nat. Bank *v.* Smith et al., 195 Pa., 38 (1900).

(74) Pa. Co. for Ins. on Lives, etc. *v.* Phila., Ger. & N. R. Co., 153 Pa., 160 (1893).

(75) Wilson *v.* Wilson-Rodgers, A Corpn., 181 Pa., 80 (1897); Kerns' Estate, 176 Pa., 375 (1896).

(76) Finney's Ap., 59 Pa., 398 (1868), citing Com. *v.* Watmaugh, 6 Whart., 117; German Union Building & Saving Fund Association *v.* Sendmeyer, 50 Pa., 67 (1865).

keeping, by whose fraudulent transfers the loss was incurred, the plaintiff cannot recover from the corporation.[77]

Where an owner of stock executed and delivered to a friend a power of attorney, authorizing the person named therein to transfer to ————, with the understanding that it was to be used in satisfaction of a particular creditor of the friend, whose name was to be afterwards inserted in the power by him, held, that the authority of the attorney was exhausted by inserting the name of the creditor whose debt was to be secured by the transfer, and that, when that debt was paid, the creditor was entitled to a return of the stock, notwithstanding the attorney had transferred it as security for other debts, by erasing the name first inserted, and inserting another in the blank which had been left in the power of attorney when executed.[78]

A power of attorney, under seal, irrevocable and expressly stated to be "for value received" to transfer a bond, is a *prima facie* sale of the bond for a present consideration, to the person in whose favor it is made, and relieves him from the burden of proving that he paid value therefor when it was transferred to him.[79]

A delivery of a power of attorney to transfer, executed in blank, is evidence of an implied authority to fill up the power with the name of the attorney to make the transfer.[80]

When A, the owner of certain shares of stock, gave a power of attorney to B to transfer the same at pleasure, and B, applying to the company for a transfer, was told that the same would not be made without a new power endorsed on the certificate of stock, and witnessed, whereupon he forged such a second power of attorney, on which transfer was made; held, in an action of trover for the value of the stock, that the first power was sufficient to pass an assignment of plaintiff's interest in the stock, and it was immaterial, as between the parties, whether the second power was forged or not.[81]

(77) Penna. R. R. Co.'s Ap., 86 Pa., 80 (1878); 5 W. N. C., 22.

(78) Denny *v.* Lyon, 38 Pa., 98 (1878).

(79) Appeal of the Pa. Co., 86 Pa., 102 (1878).

(80) German Union Bldg. & S. F. Assn. *v.* Sendmeyer, 50 Pa., 67 (1865).

(81) Morris *v.* Fire Assn., 2 W. N. C., 183 (1875).

337. Informal Transfers.

A stockholder may clothe another with the complete equitable title to the stock, without compliance with the forms printed by the corporation.[82]

A assigned shares of stock of a corporation to B, filling out the blank form of assignment, signing the same and delivering the certificates to B. The certificates bore on their face "transferable on the books of the company in person or by attorney." A was then president of the company. He notified the board of directors, and the secretary, of the assignment, and resigned. The transfer was never entered on the books. Afterwards, C, having gotten a judgment against A, issued attachment execution, summoning the company as garnishee. The company answered that A had eleven shares of stock on their books, which had not been assigned. Judgment was given against the company on the answer, and the shares were sold by the sheriff, B giving notice at the sale that he claimed the stock. The stock was afterwards marked on the company's books as transferred to the purchaser. Subsequently, B produced his certificates and demanded transfer to him, which was refused. Held, that the transfer from A to B gave the equitable title to the stock, of which the company had due notice, and it was therefore bound to protect him in the attachment proceedings.[83]

The by-laws of an insurance company provided: "20th. No transfer of any share or shares in the capital stock of this company shall be good or available unless the same be made on the books of the company, and be attested by the secretary." "21st. No holder of stock shall have the power to transfer the same so long as he is indebted to the company, unless with the consent of the board of directors." A stockholder empowered the secretary in writing to transfer certain stock, whereupon the secretary entered upon the books that the stock was transferred, "see papers filed," which writing being the power of attorney for the transfer, he wafered to the book, and attested the entry of transfer as secretary, signing no transfer as attorney. Held, that this was a substantial compliance with the law. Held, also, that though the by-laws required that transfers of stock owned by persons in-

(82) Com. *v.* Crompton, 137 Pa., 138 (1890) and cases cited; see Morris *v.* Fire Assn., 2 W. N. C., 183 (1875).

(83) Telford & Franconia Tpk. Co. *v.* Gerhab, 22 W. N. C., 175 (1888).

debted to the company should be brought before the board of directors, (but in practice such cases were never brought before said board) a transfer made without the consent of the directors, but according to the practice of the company, was good as against the company.[84]

338. Pledges of Stock.[85]

Stock delivered as collateral is presumed to retain that character, and to be the property of the pledgor, until the contrary is shown. The fact that the pledgee transfers it to his own name by virtue of the power of attorney, and as a precaution, does not destroy the title of the pledgor, nor render the pledgee liable for assessment upon the stock.[86]

Where stock, held as collateral, stands in the name of the pledgee, he is entitled to the dividends, and where they have been paid to the pledgor without the consent of the pledgee, he may sue the company for the amount thereof; and this is so, even where, after declaration and payment of dividends, the pledgor pays part of the debt, and the pledgee surrenders the old collateral note and takes a new one with more stringent terms for the balance, both notes pledging the stock as collateral, and the stock continuing in the name of the pledgee, if the new note is taken as part renewal of the old; and whether it be, or not, is for the jury.[87]

Where shares of stock having a market value are pledged to secure a particular indebtedness, with power to sell and apply, there is no jurisdiction in equity to compel a retransfer of the pledge and an account, the transaction being single and the pledgor having a complete and adequate remedy at law.[88]

Where a certificate of stock was deposited as a pledge for the payment of a judgment note, with an agreement that if the note was not paid there should be a transfer of the certificate to the creditor "to be his own property, and in payment of the note,"

(84) Chambersburg Ins. Co. *v.* Smith, 11 Pa., 120 (1849).

(85) See Chap. 12, Corporate Meetings & Elections.

(86) Morgan's Estate, 30 W. N. C., 509 (1892). But in Aultman's Ap. 98 Pa., 505-16 (1881) it was held that when stock is transferred to a man as collateral, and stands in his name, he incurs liability as a stockholder just as if he were the actual beneficial owner.

(87) Boyd *v.* Conshohocken Worsted Mills, 149 Pa., 363 (1892).

(88) Roland *v.* Lancaster Nat. Bank, 135 Pa., 598 (1890).

held, that the non-payment of the note at maturity and the receipt of monthly dividends thereafter by the creditor, did not affect such a transfer of the certificate as to cancel the note.[89]

X, being at the time insolvent, fraudulently obtained a certificate of stock from A, with blank power of attorney to transfer the same. This X pledged with B to whom he was already indebted, as collateral, B thereupon agreeing to accept X's notes for the amount of his debts at that time. A, having discovered the fraud, filed a bill against B for a recovery. Held, that A could recover his stock. A pledge is not such a purchase for value as will give a *bona fide* holder a better title than the original owner.[90]

A pledged certain shares of stock as security for payment of certain notes, and authorized the pledgees in writing to sell such shares after maturity without notice. Certain of these shares were found to have been fraudulently issued by the officers of the company emitting them, and new *bona fide* shares were issued to the pledgees in lieu thereof by the company, under a decree of court. Held, that the substitution of the genuine for the false shares was not such a change in the subject matter of the pledge as to affect its identity or the power of sale, and that the holders had the right, upon the dishonor of the notes, to sell the pledge at public or private sale, without notice to redeem or of sale.[91]

A creditor who holds stock as collateral security for his debt, and also holds liens upon the real estate of the debtor, is not obliged to claim the payment of his debt out of a fund raised by a sheriff's sale of the debtor's real estate, but may rely upon the collateral security for its payment.[92]

Unissued stock may be pledged by the person entitled to it. When issued it at once becomes a pledge.[93]

When a pledge is collateral security for all claims which the pledgee holds or may hold against the pledgor, which claims consist of a number of items, the case comes within the jurisdiction of equity under the head of account. Without an account the pledgor could not know the amount to tender, which is an

(89) Fullerton *v.* Mobley, 2 Mona., 726 (1888).

(90) Linnard's Appeal, 21 W. N. C., 40 (1886). See Sitgreaves *v.* Farmers' & Mechanics' Bank, 49 Pa., 359 (1865).

(91) Jeane's Appeal, 116 Pa., 573 (1887).

(92) Jennings *v.* Loeffler, 184 Pa., 318 (1898).

(93) Harris' Appeal, 12 Atl., 743 (1888).

indispensable condition to his right to maintain an action at law.[94]

The holder of collateral security cannot appropriate it in satisfaction of the debt at his option, unless authorized to do so by the terms of the bailment. Such a holder cannot sell it without first giving notice to the pledgor, that he may have an opportunity to redeem it. The sale must be public, with notice of time and place of sale. But when a power of attorney is delivered to the pledgee with the stock pledged, want of notice to the pledgor will not affect *bona fide* purchasers for a valuable consideration.[95]

After an unauthorized sale by a pledgee of a collateral security, he is chargeable with what would have been received had he retained it until the equity of redemption had been foreclosed by notice according to law. Stock improperly sold by the pledgee must be accounted for at the highest price it attained in the market at any time after sale.[96]

If the holder of collateral securities purchase them at his own public sale, although the sale is entirely regular, he still holds them subject to the original trust, and cannot sue upon them after the debt is paid. If the collaterals did not belong to the debtor but were used by him, the actual owner can claim them after the lender is paid.[97]

A pledgee of shares of stock in a national bank who, in good faith, and with no fraudulent intent, takes the security for his benefit in the name of an irresponsible trustee, for the avowed purpose of avoiding individual liability, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to the creditors of the bank in case of its failure.[98]

Where the pledgee converts the pledge by selling it, and then assigns for the benefit of creditors, the pledgor comes in as any other creditor, and not as a preferred one.[99]

(94) Conyingham's Appeal, 57 Pa., 475 (1868); Evans *v.* Goodwin, 132 Pa., 136 (1890).

(95) Conyingham's Appeal, 57 Pa., 475 (1868).

(96) Conyingham's Appeal, 57 Pa., 475 (1868).

(97) Hestonville, Mantua & Fairmount Park R. Co. *v.* Shields, 3 Brewst., 257 (1869).

(98) Anderson, Receiver *v.* Philadelphia Warehouse Co., 111 U. S., 479 (1884).

(99) Jamison's Estate, 163 Pa., 143 (1894).

Where a corporation, in consideration of money loaned to it—which money was actually used for the benefit of the corporation—agreed to deliver to the lender, in pledge, full-paid stock of another corporation not then issued, such contract, being upon sufficient consideration, took effect as a pledge as soon as the capital stock of the other company was in being. The title of the corporation being that of a pledgor of the stock, no further title passed to its assignee for the benefit of creditors, and the assignee had, therefore, no other claim upon the stock than to have it returned to him upon the payment of the principal debt, with interest, or to an account of the proceeds of the sale of said collateral and payment of any balance found due, after satisfaction of debt and interest.[100]

A pledgee of stock has such an interest in the corporation issuing the same as to give him a standing to contest the validity of a sheriff's sale of the property and franchises of the corporation.[100*]

339. Re-pledges of Stock.

It shall not be lawful for any person or persons, bank, savings fund, building association or any corporation to repledge or rehypothecate any stocks, bonds or other securities, received by any of them for money lent and borrowed, during the continuance of the contract of hypothecation or pledging of such securities; and such repledging or rehypothecation, without the consent of the party pledging the same, is hereby declared a misdemeanor, triable in the Courts of Quarter Sessions, and on conviction thereof any person or persons or the officers of any corporation, violating the provisions of this act, shall be sentenced to a fine not less than five hundred nor more than five thousand dollars, and undergo imprisonment for a period not exceeding five years, or both, or either, at the discretion of the court before which such person shall be prosecuted. *Provided,* That this act shall not be construed to prevent brokers from pledging or hypothecating stocks or other securities which they have purchased, in whole or in part, with their own money or credit, for others, and for which they have not been wholly reimbursed by the parties for whom such stocks or other securities have been purchased.[1]

(100) Hetzel *v.* Sawyer et al., 10 D. R., 29 (1901).

(100*) Chester Pipe & Tube Co. *v.* Saltsburg Gas Co. et al., 8 D. R., 427 (1899).

(1) Act of June 10th, 1881, P. L., 107, amending Act of May 25, 1878, P. L., 155.

A broker has no right to re-pledge the stocks held by him as collateral security for advances to a customer.[2]

It is error to admit evidence of a prior pledge of the same negotiable bonds to another, in the absence of proof of any knowledge on the part of the pledgee of the *mala fides* of the pledgor. The rights of the alleged prior pledgee, he not being a party to the record, as against the subsequent pledgee, cannot be adjudicated.[3]

In trover for the conversion of pledged certificates of stock it is not necessary to prove a tender of the debt, but the amount of the debt may be deducted by the jury from the damages to which the pledgor would otherwise be entitled. The measure of damages is the value of the stock at the time of the taking, with interest, but exemplary damages may be given if there be circumstances of outrage.[4]

Where a creditor holds stock as collateral security for the payment of a promissory note, he is not bound, at the maturity of the note and its non-payment to sell the stock, without notice from the debtor directing him to do so.[5]

When a pledgee illegally includes another debt than that secured, in his claim, and advertises the stock for sale, and a bill is then filed to enjoin the sale and to redeem, and the pledgee then offers to accept the amount justly due, but does not give the pledgor reasonable time within which to pay, and the sale takes place and the pledgee buys the stock and then sells part of it, the pledgor, in the bill so filed, may have damages for the value of all the stock, with interest, less the amount justly due to the pledgee.[6]

A pledgee cannot refuse to deliver back the stock to his pledgor because the latter owes him another debt for which the pledge was not made.[7]

The fact that stocks are deposited as collateral security for a note does not prevent the statute of limitations from running against the note.[8]

(2) Van Voorhees *v.* Rea, 153 Pa., 19 (1893).
(3) Gibson *v.* Lenhart, 111 Pa., 624 (1886); 101 Pa., 522 (1882).
(4) Neiler & Warren *v.* Kelley, 69 Pa., 403 (1871); Work *v.* Bennett, 70 Pa., 484 (1872).
(5) O'Neill *v.* Whigham, 87 Pa., 394 (1878).
(6) Blood *v.* Erie etc. Loan Co., 164 Pa., 95 (1894).
(7) McIntyre *v.* Blakeley, 12 Atl., 325 (1888).
(8) Neiler & Warren *v.* Kelley, 69 Pa., 403 (1871).

A, pledged to B stocks as collateral for debt; the debt being due and unpaid, B sold the stocks without notice to A, who had neither demanded them nor tendered payment. In trover against B, held, that the measure of damages was the market value of the stock at the time of sale, with interest.[9]

A pledgor may bring suit for an accounting, and to establish the fact that the transfer of stock was a pledge, and he may restrain a suit by the pledgee against the corporation for the stock.[10]

It seems that where one purchases stock for another, and takes a transfer on the books of the bank issuing the same, in his own name, it is sufficient if he always retain so much of the same stock as will enable him to transfer to his principal on demand, the whole amount purchased for him, and that it is not necessary that he should retain the identical shares; and where there is a residue of such shares of stock in the hands of the agent, or pledgee, at all times equal to the amount purchased or pledged, such residue will be taken to be the stock belonging to the principal.[11]

340. Transfers Made by De Facto Officers.

The issue and transfer, or the consenting to the transfer, of stock is within the sphere of the official acts of an officer of a corporation, and such transfer by an officer de facto, within his apparent duties, is binding on the corporation.[12]

341. Lis Pendens.

"In Dovey's Appeal, 97 Pa., 162, our Supreme Court declined to decide whether the doctrine of lis pendens is applicable to a transfer of stock, but the general trend of recent decisions is, that such doctrine is not applicable if such transfer be made before final decree and while the litigation is still pending." [13]

(9) Neiler & Warren *v.* Kelley, 69 Pa., 403 (1871).
(10) McDowell's Appeal, 123 Pa., 381 (1889).
(11) Gilpin *v.* Howell, 5 Pa., 41 (1846).
(12) Morris et al. *v.* Stevens et al., 17 Pa. C. C., 209 (1896); 178 Pa., 563 (1896).
(13) Morris et al. *v.* Stevens et al., 178 Pa., 563 (1896). Op. of the Court below.

CHAPTER XVII.

INDEBTEDNESS OF CORPORATIONS.

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342. Jurisdiction of Courts of Common Pleas in the Matter of Corporation Mortgages.

Each of the several courts of Common Pleas of this Commonwealth shall have and exercise all the powers of a court of chancery, in all cases of or for enforcing rights under mortgages of the property or franchises of any coal, iron, steel, lumber or oil, or any mining, manufacturing or transportation corporation, where such property or franchises, or any part thereof, shall be situate or exercisable within the limits of this Commonwealth, and belong to or be exercisable by any domestic corporation or any foreign corporation under permission granted by the laws of this Commonwealth.[1]

When the corporation shall have either voluntarily appeared to any suit brought under or covered by this act, or shall have been duly served with process, the court in which such suit is or shall be pending shall have jurisdiction of the subject matter, irrespective of the local situation in this State of the mortgaged premises; and its process to enforce any interlocutory or final order or decree made by such courts, in relation to the preservation, custody, sale or other disposition of the mortgaged premises, may be executed within any county of the State: *Provided*, That where such mortgage shall have been given by a corporation having a corporate existence in this State only, the proceedings upon the said mortgage shall be had either in the county within which

(1) Sect. 1, Act March 23, 1877, P. L., 32. This act is a re-enactment of the Act of May 5, 1876, P. L., 123, which was applicable only to mortgages given by railroad, canal or navigation corporations. The term "transportation companies" in the Act of March 23, 1877, covers those three classes of corporations, and the provisions of the act are extended to mortgages given by other classes of corporations named in the act.

The Act of April 11, 1862, P. L., 477, gave the Supreme Court all the powers and jurisdiction of a court of chancery in all cases of mortgages given by corporations. This act was repealed by the Constitution of 1874, limiting the jurisdiction of the Supreme Court.

the principal office of the said company is located or in the county in which all or part of the mortgaged premises is situated.[2]

343. Increase of Security for Existing Indebtedness.

It shall and may be lawful for any corporation existing by or under the authority of any law of this Commonwealth, which shall have mortgaged any part of its estate, corporate property and franchises for the security of all or any portion of its bonded indebtedness, to mortgage its remaining estate, corporate property and franchises, or any part of the same, as a further and additional security for the same bonded indebtedness: *Provided, however,* that no lien then existing upon such remaining estate, property and franchises, shall be thereby impaired or affected.[3]

344. Refunding of Loans Specially Authorized.

Any corporation which has heretofore been authorized by any special law to borrow money, is hereby authorized and empowered to borrow, for a period not exceeding thirty years, any sum of money, not exceeding in the aggregate the amount of the principal of such previous loan which shall at that time remain outstanding and the amount of any mechanics' liens unpaid, at a rate of interest not exceeding that allowed by law at the time, and may issue their bonds therefor, upon such terms and conditions, and secured by mortgage or otherwise, as they may deem expedient; but such new loan shall be applied exclusively to the payment of the previous loan and such mechanics' liens, and for no other purpose whatever, and all laws inconsistent herewith are hereby repealed.[4]

345. Power to Mortgage—Corporations Formed Under or Accepting the Act of April 29, 1874.

It shall be lawful for all corporations to borrow money or to secure any indebtedness created by them, by issuing bonds, with or without coupons attached thereto, and to secure the same by a mortgage or mortgages to be given and executed to a trustee or trustees, for the use of the bondholders, upon their real estate and machinery, or on their real estate alone, to an amount not

(2) Sec. 2, Act March 23, 1877, P. L., 32. The proviso is as amended by Act of June 24, 1885, P. L., 151.

(3) Act of May 15, 1874, P. L., 186.

(4) Act May 13, 1879, P. L., 57.

exceeding one-half of the capital stock of the corporation paid in, and at a rate of interest not exceeding six per centum: *Provided,* That it shall be lawful for such corporations as belong to the classes named in clauses four, five, six, seven, nine and eleven of corporations for profit, of the second class,[5] as set forth in section two of the act to which this is a supplement, and also for such corporations as belong to the class named in clause twenty-four, section two, of the Act of Assembly approved April seventeenth, one thousand eight hundred and seventy-six,[6] so to borrow money and so to secure the payment of the same, by a mortgage or mortgages on its property and franchises, to an amount not exceeding double the amount of the capital stock of the corporation actually paid in, and at a rate of interest not exceeding six per centum, and this section shall not be construed to prevent mortgages for a greater amount and at a higher rate of interest, where the power to make the same is expressly given by the terms of this statute to certain classes of corporations, or is contained in the charter of any private corporations accepting this act, or in the statutes under which certain other classes thereof are by the provisions of this statute to be controlled, governed and managed.[7]

The foregoing restrictions upon the amounts which corporations may borrow are removed by the Act of February 9, 1901, P. L., 3, amended by the Act of April 22, 1905, P. L., 280. See Sec. 246.

346. Coupon Bonds May be Exchanged for Registered.

Bonds which have been or which may be issued by the State of Pennsylvania, or by any county, city, municipal authority or corporation therein, payable to bearer, may, at the option and at the expense of the holder thereof, be returned, and new registered bonds of the same or of a larger denomination, to the aggregate amount thereof, be issued, payable at the same time and place as the bonds so retired, to the order of the holder of said registered bonds and be transferable only in the presence of the register, transfer agent, clerk, or other person duly authorized by such State, county, city, municipal authority or corporation to keep the

(5) Road construction, bridge, telegraph, ferry, water, and gas companies.

(6) Inclined plane companies.

(7) Sec. 13, Act April 29, 1874, P. L., 80, as amended by Act of May 21, 1889, P. L., 257.

transfer book and make such exchanges and transfers, which book of transfers the parties or corporation issuing such bonds are hereby required to keep; and for the interest due or to become due on the bonds so retired as aforesaid, it shall be lawful for the obligors to issue interest certificates, at the same rate of interest, due at the same time and place as the original coupons corresponding with the denominations of the registered bonds, and payable to the order of the holder of said registered bond: *Provided,* That nothing heretofore properly and lawfully done under or in pursuance of the said first section, shall be impaired or invalidated by reason of this amendment.[8]

347. Coupon Bonds May be Registered.

And it shall further be lawful for any corporate body, as aforesaid, which shall issue or may have issued coupon bond or bonds payable to bearer, to register any such original bond or bonds in the name of the holder thereof, and upon his or her request, and at his or her expense, and stamp or print in large type, or write upon the face thereof, that the same will only be paid to the order of the registered holder thereof; and from and after such stamping, printing or writing, such bonds shall only be transferable in the manner provided for in the first section of this act, unless the holder shall make them payable to bearer by a properly attested assignment to that effect such bond shall continue subject to successive registrations, limitations or transfers to bearer, at the option of each holder; and the word registered stamped, printed or written upon the coupon of such bonds, shall be legal notice that they are no longer payable to bearer but to the order of the party in whose name the bond to which the coupon is attached, shall be registered, unless the last assignment thereon duly executed, shall be to the bearer, in which event the coupon shall be payable as in other cases of coupon bonds to bearer.[9]

348. Coupon Bonds Made Payable to Order.

It shall be lawful for the holder or holders of any such coupon bonds or bond, payable to bearer, to stamp, print or write on the face thereof "payable to endorsed holder," and to endorse thereon

(8) Sec. 1, Act May 2, 1879, P. L., 47, amending Sec. 1, Act April 28, 1873, P. L., 87.

(9) Sec. 2, May 1, 1873, P. L., 87.

pay to the order of ————, signing, his, her or their names thereto in the presence of some officer authorized to take the acknowledgment of deeds, who shall attest the same under his hand and seal, and said bond, thereafter, shall only be payable to the legal holder thereof, or the legal representative of such holder; such bond or bonds shall continue subject to successive transfers in the same manner, and with like force and effect by the person thus legally holding the same; and the holder of such bond may stamp, print or write on the coupons thereof "endorsed," and such stamping, printing or writing on the face and coupons of such bond, shall be notice that they are no longer payable to bearer, but to the endorsed holder, or order, or the legal representatives thereof, unless the last endorsement shall be to bearer when they shall be payable as other coupon bonds to bearer.[10]

349. Registrations Made as Above Validated—Special Enactments Not Repealed.

Registrations made, or to be made, of such bonds, in the manner herein provided, or in such other manner as may have been adopted between the makers and holders thereof, shall be valid; and the provisions of this act shall not be construed as repealing special enactments in regard to the transfer of bonds of any corporation, nor shall the transfer of any bond or bonds in the manner herein provided impair any security or the lien of any mortgage, which may have been given to secure the payment thereof, or the rights, duties and powers of any trustee in relation thereto.[11]

350. Bridge Companies Incorporated by Special Acts May Issue Bonds.

It shall be lawful for any bridge company, incorporated by any special law of this Commonwealth, to borrow money or secure any indebtedness created by them, by issuing bonds, with or without coupons attached thereto, and secure the same by a mortgage or mortgages, to be given and executed to a trustee or trustees for the use of the bondholders, upon their real estate, bridges, improvements, property and corporate rights and franchises, to an amount not exceeding one-half of the capital stock of the cor-

(10) Sec. 3, Act May 1, 1873, P. L., 87.
(11) Sec. 4, Act May 1, 1873, P. L., 87.

poration paid in, and at a rate of interest not exceeding eight per centum per annum: *Provided,* That any bridge company or companies, accepting the provisions of this act, shall thereafter hold their charters subject to the provisions of the Constitution.[12]

A theatre company may borrow money necessary to keep its theatre open, if the best interests of the company require it, though the money be paid to the employes of the lessee of the theatre, and the property may be mortgaged by the stockholders and directors of the company to secure the loan.[12*]

A private corporation having an implied power to become a party to any negotiable instrument, when a corporation by the endorsement of an order applies its funds for the benefit of another corporation, with which it presumably has had financial relations, the burden of proof is on the party alleging that the endorsement and delivery of the order was fraudulent or ultra vires.[12**]

351. Iron and Other Manufacturing Corporations May Mortgage Property.

All iron and other manufacturing and mining corporations incorporated under the laws of this Commonwealth, shall be and hereby are enabled to borrow moneys, and to secure the loans to be made to them, by mortgage of their property, and to dispose of their bonds, or certificates of loan, or pay interest thereon at such rates as railroad and canal companies may now do.[13]

352. Implied Power to Issue Bonds and Secure the Same by Mortgage.

Unless forbidden by statutory or charter restriction, a corporation may, without a special authority, borrow such moneys as may be necessary to carry out the purposes of incorporation, and issue negotiable securities therefor, as fully as an individual may do so.[14] Corporations not exercising public franchises have, also,

(12) Sec. 2, Act May 1, 1876, P. L., 91.

(12*) Thomas *v.* East End Opera House Co., 47 Pitts. L. J., 230 (1899).

(12**) Howard Oil & Grease Co. *v.* Hughes, 12 Super. Ct., 311 (1900).

(13) Act January 11, 1867, P. L. 1372.

(14) Phila. & S. R. Co. *v.* Lewis, 33 Pa., 33 (1859); Pitts, etc. R. C. *v.* Allegheny County, 63 Pa., 126; Gloninger *v.* Pitts. & C. R. Co., 139 Pa., 13 (1891); McMasters *v.* Reed, 1 Gr., 36 (1854); First Baptist Church of Erie *v.* Caughey, 85 Pa., 271 (1877); Phila. & Reading R. R. Co. *v.* Stichter, 11 W. N. C., 325 (1882). See Orr *v.* Mercer Co. Mut. Fire Ins. Co., 114 Pa., 387 (1886).

an implied power to mortgage their property to secure debts properly contracted for the furthering of the objects of the corporation.[15]

353. Quasi Public Corporations Have No Implied Power to Mortgage.

Railroad and other companies exercising public franchises have no implied power, however, to mortgage such franchises nor their property essential to the exercise thereof, and may not do so without express authority,[16] though they may mortgage such property as is not essential to the enjoyment of their said franchises.[17]

354. Statutory Provisions Permitting Quasi Public Corporations to Mortgage.

Such quasi public corporations are authorized to mortgage their franchises and property by acts as follows: Railroads; Sec. 8, Act of April 4, 1868, P. L., 62; traction companies, Sec. 3, Act March 22, 1887, P. L., 8; street railway companies, Sec. 6, Act of May 14, 1889, P. L., 211; underground railway companies, Sec. 6, Act of June 7, 1901, P. L., 526; turnpike, bridge, telegraph, ferry, water, gas and incline plane companies by Sec. 13, Act of April 29, 1874, P. L., 80; pipe line companies and boulevard companies, created under acts amendatory of the Act of April 29, 1874, derive their power to mortgage from said 13th Sec. of said Act of 1874. Natural gas companies are permitted to mortgage their franchises and property by Sec. 3 of the Act of May 29, 1885, P. L., 31.

355. Removal of Restrictions on Amounts Which Corporations May Borrow.

Sec. 13, Act of April 29, 1874, P. L., 80, as amended by Act of May 21, 1889, P. L., 257, permits road construction, bridge, tele-

(15) Gordon *v.* Preston, 1 Watts, 385 (1833); Watts' Ap., 78 Pa., 370 (1874); Fritchman's Ap., 30 Pitts. L. J., 455 (1882); Cook on Corpns., Sec. 779; Thomp. Corp., Sec. 6131; Lancaster *v.* Dolan, 1 Rawle, 231.

(16) Steiner's Ap., 27 Pa., 313 (1856); Wood *v.* Bedford & Bridgeport R. R. Co., 8 Phila., 94 (1871). See Taylor *v.* P. & R. R. Co., 7 Fed. Rep., 386 (1881); Thomp. Corp., Sec. 6137; Cook on Corpns., 780; Clark & Marshall, Secs. 162a, 163a.

(17) Plymouth R. R. Co. *v.* Colwell, 39 Pa., 337. Cook on Corpns., Sec. 781.

graph, ferry, water, gas and incline plane companies to issue bonds to an amount equal to twice their paid-in capital stock. Other corporations formed under or accepting the provisions of said act [18] are permitted by said section to issue bonds to an amount equal to but one-half of their paid-in capital stock, except iron and steel companies, which, under the provisions of Sec. 38, Cl. 2, of said Act of 1874, were permitted to issue bonds to three times the amount of their paid-in capital stock. By Sec. 8 of the Act of April 4, 1868, P. L., 62, railroad companies may issue bonds to but twice the amount of their capital stock.

The Act of April 22, 1905, P. L., 280, amending Sec. 1 of the Act of February 9, 1901, P. L., 3, provides that corporations may increase their indebtedness to such an amount as they may deem necessary, without regard to the amount of capital stock authorized by them respectively, and regardless of any limitation upon the amount of either prescribed in any general or special law regulating such corporation.[19]

356. Who Has Power to Execute Mortgages.

The power to authorize the execution of corporate mortgages is in the board of directors, and not in the body of stockholders, where there is no provision to the contrary.[20] The execution of a mortgage must be authorized by action of the board at a regular or special meeting, but it seems that a formal resolution need not be shown, the presence of the corporate seal upon the instrument, with the signatures of the proper officers, generally the president and secretary, being presumptive evidence that the proper precedent authority has been given.[21]

While, where the issue of bonds secured by mortgage constitutes an increase of indebtedness, such increase must be authorized in the manner provided by Sec. 7, Art. 16 of the Constitution,

(18) The language of said Sec. 13, Act of April 29, 1874, is "all corporations," by this was doubtless meant all corporations formed under said Act of 1874, or accepting its provisions, and when the same language was repeated in the amendment of May 21, 1889, P. L., 257, it probably was used in no wider sense.

(19) See Sec. 246 and Com. *v.* Buffalo & Susquehanna R. Co., 4 Dauph. Co. Rep., 135 (1901); 10 D. R., 363.

(20) Gordon *v.* Preston, 1 Watts, 385 (1833); Thomp. Corps., Secs. 6171-77; Cook on Corpns., Sec. 808; McCurdy's Appeal, 65 Pa., 290 (1870).

(21) Thomp. Corps., Secs. 6175-6.

and the Act of February 9, 1901, P. L., 3, the actual execution of the bonds and mortgage need not, apparently, be authorized by the stockholders, but merely by the board of directors.

Corporation mortgages are executed by being signed with the name of the corporation, followed by the word "by" and the signatures of the president and secretary, with their official titles affixed, and acknowledged by the president, or both president and secretary, and attested by the corporate seal.

Where a mortgage is properly executed under the corporate seal, and recites that it was authorized by resolution of the board of directors, the mortgagee is not required to inquire further, if the company be authorized to mortgage its property or franchises or both.[21*]

Where a mortgage has been executed without proper authority, the corporation must act with reasonable promptness in disavowing it, otherwise the company will be estopped from denying that its execution was authorized.[22]

Where it appeared that a mortgage had been executed and recorded, and bonds negotiated upon the faith thereof, and it was contended that there had been no delivery of the mortgage, held, that there was sufficient evidence of a delivery, and that the mortgage was a lien upon the corporate property.[23]

If a mortgage by a corporation be executed, not on a charter day, or day appointed by a by-law, but at a special meeting convened without notice, written or verbal, to the directors who did not attend it, it would be voidable by the corporation. If no objection is made by the corporation the mortgage is ratified. A judgment creditor cannot take advantage of such an irregularity so as to defeat the mortgage and entitle himself to the proceeds of the sale of the mortgaged property.[24]

Where the charter of a corporation provides that its property shall be purchased, held, managed and sold by a board of trustees, a mortgage executed merely by the president and secretary is invalid and not admissible in evidence.[25]

(21*) Manhattan Hardware Co. *v.* Phalen, 128 Pa., 110 (1889); Same *v.* Roland, 128 Pa., 119 (1889).

(22) Lewis *v.* Phila. Axle Works, 1 W. N. C., 327 (1875).

(23) McCurdy's Appeal, 65 Pa., 290 (1870).

(24) Gordon *v.* Preston, 1 Watts, 385 (1833). See Kersey Oil and Min. Co. *v.* Oil Creek & Allegheny River R. Co., 5 W. N. C., 144 (1877).

(25) Neucleus Association *v.* McElroy, 47 Leg. Int., 202 (1890).

357. Mortgage on Property to be Subsequently Acquired.

A railroad company under authority of law mortgaged "all their road, property, rights, liberties, privileges, corporate franchises, income, tolls and receipts then held or thereafter to be acquired." Held, that the mortgage was a lien upon engines, rolling stock, etc., in actual use by the company and required for the transaction of its business, whether owned at the date of the mortgage or subsequently acquired. One may grant the future accretions of any subject he owns at the time of the grant.[26]

358. Corporate Bonds Negotiable.

Such bonds are not strictly negotiable, under the law merchant, as promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and, being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery, so as to enable the holder to maintain an action on them in his own name. Possession is *prima facie* evidence of ownership.[27]

A bond of a corporation payable to an obligee named or his assigns is assignable under the Act of May 28, 1715, so as to enable the assignee to sue in his own name. Such bond is assignable in equity by parol delivery, but an action on it cannot be maintained in the assignee's name. The suit must be in the name of the obligee. Corporate bonds payable to bearer may be sued in the name of the holder, not being within the provisions of the Act of 1715.[28]

"Being negotiable securities, every transfer of the bonds to a new holder, for value and without notice, would give the latter a good title to them as against the former holder. That such is the status of coupon bonds, similar to those in question, is too well settled by recent decisions to admit of any doubt: County of Beaver *v.* Armstrong, 8 Wright [44 Pa.] 63; Murray *v.* Lardner, 2 Wal., 110, and Commissioners *v.* Bolles, 4 Otto, 109. Like a bank note or promissory note endorsed in blank, they pass by

(26) Phila., Wil. & Balto. R. R. Co. *v.* Woelper, 64 Pa., 366 (1870). See discussion for the reason of this rule, Thomp. Corp., Secs. 6143-44. Covey *v.* Pitts., F. W. & C. R. Co., 3 Phila., 173 (1858); Gloninger *v.* Pitts. & C. R. Co., 139 Pa., 13 (1891).

(27) Carr *v.* LeFevre, 27 Pa., 413 (1856); Bunting's Admr's *v.* Camden & Atl. R. Co., 81 Pa., 254 (1876).

(28) Bunting's Admr's *v.* Camden & Atl. R. Co., 81 Pa., 254 (1876).

delivery and a good faith purchaser is unaffected by want of title in his vendor. The last taker is presumed to be a *bona fide* holder for value." [29]

359. Bonds Stolen or Transferred Without Authority.

As stated in the preceding citation, a *bona fide* holder for value of corporate bonds, payable to bearer, acquires a good title to them, although such bonds may have been stolen or transferred without authority.[30] And it is immaterial whether the corporation issuing the bonds received value for them, or not. A *bona fide* purchaser has nothing to do with the application of the money paid for the bonds.[31]

360. Presumption As to Dats of Issue of Bonds.

It has been held to be a presumption of law that all bonds of a series were issued at the same time, which were secured by the same mortgage, and that the fact they were numbered consecutively gave no priority to any, and interfered in no manner with the equality of the holders thereof on distribution.[32]

361. Increases of Indebtedness.

No corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting to be held after sixty days' notice given in pursuance of law.[33]

Acts providing for increases of both capital stock and indebtedness will be found supra.[36]

(29) Gibson *v.* Lenhart, 101 Pa., 522-27; 111 Pa., 624 (1882); Mason *v.* Frick, 105 Pa., 162 (1884); Reed's Appeal, 122 Pa., 565 (1888); Rice *v.* So. Pa. Iron & R. R. Co., 9 Phila., 294 (1873).

(30) Connor *v.* Fifth Nat. Bank of Pitts., 31 Pitts. L. J., 370 (1883); Carpenter *v.* Rommel, 5 Phila., 34 (1862). See Moelling *v.* Lehigh C. & N. Co., 8 W. N. C., 194 (1880).

(31) Phila. & Sunbury R. R. Co. *v.* Lewis, 33 Pa., 33 (1859).

(32) Com. *v.* Susq. & Del. River R. Co., 122 Pa., 306 (1888).

(33) Sec. 7, Art. 16, State Constitution.

(36) See Secs. 244, 245, 246.

The constitutional requirements as to increases of indebtedness are not applicable to mortgages given to raise funds wherewith to pay off incumbrances in order to protect a debt due to the corporation [37] nor to secure debts already contracted in carrying on the ordinary business of a corporation.[38]

A railroad corporation, existing under charters from the States of New York and Pennsylvania, may not execute a mortgage in the former State, which will pass title to property in Pennsylvania, without complying with the requirements of Sec. 7, Art. 16 of the Constitution.[39]

362. What Are Not Increases of Indebtedness Within the Meaning of Section 7, Art. 16, of the Constitution.

The liabilities of a manufacturing company, accrued in the improvement of its property, the employment of labor or the purchase of materials, do not constitute such an increase of indebtedness, as under Sec. 7, Art. 16, of the Constitution, and the acts providing for the increase of indebtedness by corporations, requires a previous meeting and consent of stockholders to validate them.[40]

A corporation executed and delivered a mortgage and applied the money raised thereon to discharge a purchase money mortgage on the mortgaged property, the mortgagee receiving moreover certain shares of the stock of the company, with a note of its officers as additional security for the loan. As the mortgage did not increase the indebtedness of the company, held, that it was not invalid because in violation of Sec. 7, Art. 16, of the Constitution, and that, in the absence of fraud, the mortgagee had a right to all the security the company or its officers were willing to give him.[41]

The provisions of Sec. 7, Art. 16 of the Constitution do not apply to the sale of mortgage bonds of a railroad company from

(37) Lewis *v.* Jeffries, 86 Pa., 340 (1878).

(38) Quaker City Nat. Bank *v.* Gilkeson, 18 Pa. C. C., 557 (1896); Manhattan Hardware Co. *v.* Phalen, 128 Pa., 110 (1889); Powell *v.* Blair, 133 Pa., 550 (1890); 7 Pa. C. C., 492.

(39) Pitts. & St. L. R. Co. *v.* Rothschild, 4 Cent., 107.

(40) Manhattan Hardware Co. *v.* Phalen, 128 Pa., 110 (1889); Quaker City Nat. Bank *v.* Gilkeson, 18 Pa. C. C., 557 (1896).

(41) Powell *v.* Blair, 133 Pa., 550 (1890); 7 Pa. C. C., 492; Ahl *v.* Rhoads, 84 Pa., 319.

which it receives the money from innocent purchasers, at par, for construction and equipment. The debt is not fictitious though the securities may turn out to be largely so.[42]

Nor do the provisions of said section 7 apply to a corporation which was invested by its charter, before the present Constitution was adopted, with unrestricted power to make such increase, and which company accepted the benefits of no legislation subsequent to 1874, though the company, by accepting legislation in 1868, subjected itself to the provisions of the Act of May 3, 1855, P. L., 423, and the Constitutional Amendment of 1857.[43]

Where a bank without the consent of its stockholders executes a mortgage upon its property to secure a debt of a creditor, which debt consists of deposits in the bank, the execution of the mortgage is not an increase of indebtedness within the meaning of Sec. 7, Art. 16, of the Constitution. And even if the execution of said mortgage were such an increase, it would not be subject to said section 7, where the bank was incorporated prior to the adoption of the Constitution of 1874, and had never accepted the provisions thereof nor those of any legislation had thereunder.[44]

363. Bonds Not Invalidated by Defects in Mortgages Securing Them.

A corporation issued bonds, with interest bearing coupons, and agreed that upon three successive defaults in payment of interest the principal should become due. The bonds were secured by a mortgage, providing that its trustee should sell the mortgaged property at the request of the holders of $100,000 of the bonds. Held, that the bond was the principal debt, the mortgage the incidental security, and that the provision in the mortgage afforded no defense to a suit on the bonds, after a breach of their condition.[45] Nor are the bonds of a railroad company rendered void in consequence of being secured by a mortgage which the company may have had no authority to execute.[46]

(42) Fidelity Ins., Tr. & S. D. Co. *v.* W. Penn. & So. Connecting R. Co., 138 Pa., 494 (1890).

(43) Gloninger *v.* Pitts. & Connellsville R. R. Co., 139 Pa., 13 (1890).

(44) Ahl *v.* Rhoads, 84 Pa., 319 (1877).

(45) Phila. & Balto. Central R. R. Co. *v.* Johnson, 54 Pa., 127 (1867).

(46) Phila. & Sunbury R. Co. *v.* Lewis, 33 Pa., 33 (1859).

364. Mortgages are Valid Though Covering Subjects Which the Corporation is Not Authorized to Mortgage.

Where a railroad company expressly authorized by its charter to mortgage its railroad and other property, but without express authority to mortgage its corporate franchises, made a mortgage covering both railroad and franchises, the validity of the mortgage as to the railroad is unaffected by the inclusion of the corporate franchises therein, even if unauthorized,[47] and when in sci. fa. on a mortgage executed by a church corporation, the corporation pleaded that it had but a qualified estate in the mortgaged property, and as it could not alien the land, the mortgage was a nullity, held, that such estate as the corporation had was covered by the mortgage.[48]

365. Bonds Illegally Issued or Transferred.

Bonds which show upon their face that they were issued the day after the corporation was organized, are void, as it is evident, in such case, that the meeting at which the authority to issue the same was granted, could not have been held after sixty days' notice, as required by Sec. 7, Art. 16 of the Constitution.[49]

When bonds of a railroad company issued before the full amount of capital stock was paid in, as required by Sec. 3 of the Act of May 7, 1887, P. L., 94, (See Sec. 1261c) are pledged for a debt amounting to much less than the face value of the bonds, stockholders of the company purchasing such bonds from the pledgee, with knowledge of the illegality of the bonds, and the circumstances under which they are pledged cannot recover more than the amount paid therefor.[49*]

A corporation deposited certain of its bonds with trustees to be delivered by them to such persons as the board of directors should designate. A purchaser received some of the bonds with a blank power of attorney to transfer them. Afterwards he loaned the company money under an agreement that he was to receive additional bonds as collateral. These bonds were delivered to him by the trustees on the request of three of the board of directors, one

(47) Gloninger *v.* Pitts. & C. R. R. Co., 139 Pa., 13 (1891); Randolph *v.* Wilmington & Reading R. Co., 11 Phila., 502 (1876).

(48) St. John's Church *v.* Steinmetz, 18 Pa., 273 (1852).

(49) Maas *v.* Poughkeepsie & N. E. R. R. Co., 1 Mona., 497 (1889).

(49*) Shellenberger *v.* Altoona & P. C. R. R. Co., 212 Pa, 413 (1907).

of whom was the secretary, another the treasurer and the third the general manager of the corporation. Subsequently the company was adjudged a bankrupt and its real estate sold under a mortgage prior in lien to the mortgage by which the bonds were secured. The trustee in bankruptcy claimed the whole fund as against the holder of the bonds securing the loan, on the ground that the transfer of the bonds had not been authorized by the directors as a board and because no power to transfer had been executed by the directors. Held, that the loan should be paid out of the fund.[49**]

366. Actions on Coupons.

In the case of bonds with interest coupons attached, the latter may be detached from the bonds, as they become due, and, if not paid at maturity, the holder may recover interest thereon from the obligors.[50] Such coupons are negotiable instruments and may be sued upon separately from the bonds.[51] And it is not necessary in actions upon such coupons to file copies of the bonds to which they are or were attached.[52]

Where a person who is practically the owner of all the bonds and stock of a corporation, detaches the coupons from certain of the bonds after the coupons were past due, and pledges the bonds with the coupons thus detached as security for a debt with a bank, at which the coupons were payable, and the president of which was one of the trustees named in the mortgage, and the owner of the bonds at the time they were pledged makes no representations one way or the other as to whether the coupons which had been detached had been paid, canceled or destroyed, or were to be held by him as a lien on the mortgaged property prior to the bonds pledged the owner, or the persons to whom the owner has pledged the detached coupons for an antecedent debt, are entitled to come in on the fund subsequently raised by a sale of the mort-

(49**) Presbyterian Board *v.* Gilbee, 212 Pa., 310 (1905).

(50) Phila. & Reading R. R. Co. *v.* Knight, 124 Pa., 58 (1889).

(51) County of Beaver *v.* Armstrong, 44 Pa., 63 (1864); Phila. & R. R. Co. *v.* Smith, 105 Pa., 195 (1884); Same *v.* Fidelity Ins., T. & S. D. Co., 105 Pa., 216 (1884).

(52) Megargee *v.* Danville, H. & W. R. Co., 2 W. N. C., 535 (1876); Parrish *v.* Phila. & R. Coal & Iron Co., 7 W. N. C., 196 (1879); Copeland *v.* Same, 13 Phila., 8 (1879); 7 W. N. C., 15; Phila. & R. R. Co. *v.* Fidelity etc. Co., 105 Pa., 216 (1884); Same *v.* Smith, 105 Pa., 195 (1884).

gaged property under foreclosure proceedings in priority to the bonds from which the coupons were detached.[52*]

Though it may be that under the terms of a mortgage securing a bond issue there can be no seizure of property conveyed to the trustee, in a judgment obtained upon an interest coupon, the plaintiff is entitled to a general judgment.[52**]

367. Actions on Coupons—Continued.

Where bonds recited that they were signed by the president of a corporation, but were actually signed by the vice-president, in an action to recover the amount of certain coupons belonging to such bonds, the bonds and mortgage not being in evidence, the coupons were received in evidence and a verdict was directed for the plaintiff.[53]

Where a mortgage recited an intention to fund certain specified coupons of bonds secured by another mortgage, by issuing scrip for them, convertible into bonds secured by the mortgage containing the recital, and the holders of the specified coupons petitioned for mandamus to compel the funding thereof, held, that the mortgage was not a contract nor evidence of a contract, and that there was no evidence of a contract with the holders of the coupons to entitle them to the relief asked.[54]

In an action to recover the amount of certain coupons, where no affidavit has been filed denying the proper execution of the same, evidence that the coupons were not properly executed will be excluded.[55]

Where an action was brought on coupons of bonds issued by a New Jersey corporation, and secured by mortgage, the affidavit of defense alleged that the law of New Jersey under which the bonds were issued, provided that in case of default as to interest, foreclosure and sale of the mortgaged property should precede an action on the bonds. Rule for judgment discharged.[56]

(52*) Rhawn *v.* Edge Hill Furnace Co., 201 Pa., 637 (1902).

(52**) Railways Co. General *v.* Newtown Elec. St. Ry. Co., 32 Pa. C. C., 38 (1906). See Western Penna. Hospital *v.* Merc. Library Co., 189 Pa., 269 (1899).

(53) Conshohocken Tube Co. *v.* Iron Car Equip. Co., 161 Pa., 391 (1894).

(54) Com. *v.* Wilmington & N. R. Co., 2 Mona., 538 (1889).

(55) Roberts *v.* Iron Car Equip. Co., 161 Pa., 348 (1894).

(56) Newman *v.* Brigantine B. R. Co., 15 Pa. C. C., 625 (1894).

After maturity all coupons are equally entitled to payment out of a sum set apart for payment of interest, without regard to the time when they respectively matured.[57]

Upon the distribution of the proceeds of the sale of the property and franchises of a railroad company, upon the foreclosure of a mortgage, A made claim for the amount of certain coupons which had been paid by the company, with funds furnished by A, under an agreement that the company would deliver the coupons so paid to A, as security for the money so advanced. Held, that the coupons ceased to be an obligation of the company as soon as they were paid, and that they could not be kept alive as against the bondholders by an agreement to which said bondholders were not parties.[58]

When an action is brought upon coupons it is not necessary to prove the execution of the mortgage securing the bonds to which the coupons were attached, particularly where a rule of court providing for an affidavit denying the execution of a writing sued upon has not been complied with.[59]

Where a person who practically owned all the stock and bonds of a corporation pledged certain bonds thereof from which he had first cut the interest coupons, making no representations in regard to such coupons, and afterwards pledges the coupons for an antecedent debt, there is no presumption that such coupons have been paid or cancelled, and the holders are entitled to come in on a fund raised by a sale of the mortgaged property under foreclosure proceedings.[59*]

368. Statute of Limitations.

The statute of limitations cannot be set up to prevent a recovery upon coupons which have not been detached from bonds. Nothing can avail to defeat a recovery upon them, but the presumption of payment which the law allows at the end of twenty years. Such presumption may, however, be rebutted by evidence of non-payment. Not decided whether the statute of limitations

(57) Leavitt *v.* Felton, 11 W. N. C., 74 (1881).

(58) Fidelity Ins., T. & S. D. Co. *v.* West Penn. & S. C. R. Co., 138 Pa., 494 (1891).

(59) Conshohocken Tube Co. *v.* Iron Car Equipment Co., 161 Pa., 391 (1894); Roberts *v.* the Same, 161 Pa., 348 (1894).

(59*) Rhawn *v.* Edge Hill Furnace Co., 201 Pa., 637 (1902).

may be pleaded against coupons detached from bonds, and in the hands of another than the holder of the bonds.[60]

369. Interest Upon Coupons.

A corporation which issues a coupon bond is in the position of the maker of a promissory note, and not in that of the drawer of a bill of exchange. There is no obligation on the part of the holder to present the bond or its coupons and demand payment thereof within a reasonable time after maturity.[61] The bonds bear interest after maturity unless the corporation issuing them had the money for the payment thereof at the proper time and kept it there for that purpose.[62] And the coupons bear interest from the time they become due, and no presentation or demand of payment is necessary to set the interest running, but the corporation need not pay interest on the coupons if it can show that it had funds on hand, at the proper time and place, to pay said coupons, had they been presented.[63]

In an action by A against B, a railroad company, to recover on coupons with interest from date when due, the declaration, alleged on belief, that the coupons were presented at B's office for payment when due, but, if not, it was because B had refused to pay other coupons of the same date. B pleaded that it had no knowledge of such presentation. Judgment for plaintiff for want of sufficient affidavit of defense.[64]

In an action to recover the amount of certain corporate bonds and the coupons thereto belonging, an affidavit of defense which alleges that payment of the coupons was never demanded, but fails to allege that the defendant corporation had provided funds for their payment at the time and place where they were payable is insufficient to prevent judgment.[65]

(60) Phila. Trust Co. *v.* Phila. & Erie R. Co., 160 Pa., 590 (1894); Phila. & R. R. Co. *v.* Fidelity etc. Co., 105 Pa., 216 (1884); Hembold *v.* Danville, H. & W. R. R. Co., 14 W. N. C., 128 (1883).

(61) Williamsport Gas Co. *v.* Pinkerton, 95 Pa., 62 (1880).

(62) Cook on Corpns., Sec. 771.

(63) North Penna. R. R. Co. *v.* Adams, 54 Pa., 94 (1867); Phila. & Balto. Central R. R. Co., *v.* Johnson, 54 Pa., 127 (1867); Moody *v.* Phila. & R. R. Co., 16 Phila., 74 (1883); Phila. & R. R. Co. *v.* Knight, 23 W. N. C., 215 (1889); 124 Pa., 58; Same *v.* Smith, 105 Pa., 195 (1884); Emlen *v.* Lehigh Coal & Nav. Co., 47 Pa., 76 (1864).

(64) North Penna. R. Co. *v.* Adams, 54 Pa., 94 (1867).

(65) Phila. & Balto. Central R. Co. *v.* Johnson, 54 Pa., 127 (1867).

It would seem that interest cannot be recovered on interest accrued on a registered bond.[66]

370. Lost Coupons.

The amount of lost coupons may be recovered upon the giving of a bond of indemnity by the owner, with interest from the date of demand and tender of such bond.[67]

371. Guarantors of Corporate Obligations.[68]

The guarantors of corporate bonds are liable as principals, and their liability is co-extensive with that of the original obligors.[69] They are liable on both bonds and coupons and for interest on coupons from date of default.[70]

Where a railroad company leases the property and franchises of another railroad company, and covenants in the lease to pay operating expenses, and to apply the surplus of earnings, if sufficient for that purpose, to the payment of the coupons for interest on underlying first mortgage bonds of the lessor company, previously issued, the agreement does not amount to a guaranty to the holders of the coupons and they have no right of action against the lessee company to recover the amounts of the coupons.[71]

A railroad company leased the road of another company and guaranteed, by endorsement of the president of the company, the payment of the interest coupons of the bonds of the lessor company, and took possession of said road and operated it for a number of years, paying said interest coupons regularly. The lease was not presented to nor acted upon by the stockholders until several years had elapsed, when it was disaffirmed. No ex-

(66) Sherman *v.* Phila. & Reading R. Co., 13 W. N. C., 238 (1883).

(67) Fitchett *v.* North Penn R. R. Co., 1 Walker, 129 (1863); 5 Phila., 132.

(68) See Sec. 421.

(69) Pennypacker *v.* Camden & Atl. R. Co., 14 W. N. C., 158 (1883).

(70) Love *v.* Phila. & R. R. Co., 19 Phila., 304 (1888); Phila. & R. R. Co. *v.* Knight, 23 W. N. C., 215 (1889); 124 Pa., 58. See Camden & Atl. R. Co. *v.* Coxe, 18 W. N. C., 20 (1885).

(71) Freeman *v.* Penna. R. Co., 173 Pa., 274 (1896).

press authority had been given to guarantee the bonds. The reports of the lessee company from the date of the lease showed the operations of the company under the same. In an action by a coupon holder against the lessee company, as guarantor, the court left it to the jury whether under all the facts the lessee company had knowledge of the existence of the lease and acquiesced therein.[72]

372. Mortgage Deeds of Trust—Trustees.

The mortgages of corporations are usually in the form of deeds of trust to trustees for the benefit of the bondholders.

"This class of investments . . . . has become very common in our day. Besides the two contracting parties there are the creditors, unascertained indeed, when the instrument is made, but well known as a party when the remedies come to be discussed. Between them and their trustees it is nothing but a trust—between the trustees and the mortgagor it is nothing but a mortgage, and, if the plaintiffs be regarded as the substantial plaintiffs on this record, the instrument can be regarded as nothing else than a mortgage." [73]

When a mortgage provides for the appointment of a trustee to fill a vacancy in a trusteeship by a majority of the bondholders, a Court of Common Pleas may, under the power conferred by Sec. 23 of the Act of June 14, 1836, P. L., 633, confirm such trustee upon petition of a bondholders' committee representing a majority of the bonds, and the decree confirming such appointment is equivalent to a finding of fact that the petitioners were, in fact, a committee of the holders of a majority of the bonds outstanding at the time of the decree.[73*]

Where a corporation executes a mortgage to a trustee to secure the payment of its bonds, the trustee must apply the proceeds to the payment of bondholders pro rata. He must not permit the least discrimination between members of the same creditor class. The remedy of the bondholders against the property conveyed to the trustee is through him only.[74]

(72) Camden & Atl. R. R. Co. *v.* Coxe, 18 W. N. C., 20 (1885).
(73) Ashhurst *v.* Montour Iron Co., 35 Pa., 30 (1860).
(73*) Tarbell's Appeal, 7 Pa. Super. Ct., 283 (1898).
(74) Com. *v.* Susquehanna & Del. R. R. Co., 122 Pa., 306-20 (1888). See Widener *v.* R. R. Co., 1 W. N. C., 472 (1875).

"As to other property of the company, not conveyed to the trustee, the bondholder may treat himself as an individual creditor, and may proceed to recover judgment for the amount of unpaid coupons or bonds, and enforce the collection thereof against the defendant: Carr *v.* LeFevre, 27 Pa., 413; Phila. & Balto. Central R. Co. *v.* Johnson, 54 Pa., 127. But his execution must be levied upon property actually owned by the company, and not upon that which has been conveyed to trustees by mortgage or deed of trust duly executed and recorded. He stands, when suing at law and proceeding against the railroad company, on the same plane as any other creditor. His writ of fi. fa. will reach the same property and in the same way. When, however, it becomes necessary for him to reach the property held by the trustee, he must proceed against him, not for his own separate benefit, but as a bondholder and on behalf of the bondholders as a class. What may be realized by such proceeding belongs to the whole class, and must be distributed among its members pro rata. This is recognized, though not distinctly asserted, in Bradley *v.* Chester Valley R. R. Co., 36 Pa., 141, and in Mendenhall *v.* The W. Chester & Phila. R. Co., reported as a note to the case last cited. The case of the Phila., Wil. & Balto. R. Co. *v.* Woelper, 64 Pa., 366, is, however, an authority substantially in point." [75]

In the foregoing case the holder of bonds secured by a mortgage to a trustee brought suit against the company issuing the bonds for unpaid interest, obtained judgment by default and had the franchises, rights of way and property of the company sold under his fi. fa. Held, that such sale passed no title to the franchises and property covered by the mortgage.

It seems, however, that a bondholder may bring suit against the corporation issuing the same, although such bond may be secured by a mortgage given to a trustee, on the corporate property, provided that there be no prohibition of so doing in the bond, but he will be restricted from issuing execution against the specific property pledged by the mortgage. To reach that he must sue the trustee.[76]

No action will lie against the trustee of a mortgage of a corpora-

(75) Com. *v.* Susquehanna & Del. R. R. Co., 122 Pa., 306-20 (1888); Ritter *v.* Conshohocken Ry. Co., 11 D. R., 703 (1902).

(76) Western Pa. Hospital *v.* Mercantile Library Hall Co., 189 Pa., 269 (1899).

tion for loss occasioned to a bondholder under the mortgage by reason of the fact that the mortgage was not a first mortgage, where there is no statement in the bond that the mortgage was a first mortgage, and the only matter in the mortgage upon the subject is the recital of a resolution passed at a meeting of the stockholders of the corporation that the mortgage should be a first mortgage.[77]

A bondholder is not entitled to attack collaterally a decree in favor of an opposing creditor for collusion or fraud, but is affected and precluded by the decree against his trustee. If there were fraud or collusion his remedy is against the colluding parties, or by application to the court for a review.[78]

Where a mortgage provided that in the event of failure to pay interest on the bonds secured by it the trustee might enter and administer the property of the mortgagor for the benefit of the bondholders, and the mortgagor defaulted in the payment of interest, the court refused to decree the sale of the mortgaged property, that not being a remedy granted by the mortgage.[79]

Where trustees have power under a mortgage to preserve, repair and maintain the road of the mortgagor company, they may complete an extension of the road to the terminus set forth in the charter.[80]

The trustee in a mortgage to secure the bonds of a railroad corporation will not be permitted to intervene as a party defendant in a proceeding in quo warranto at the relation of the Attorney General to forfeit the charter of such company.[80*]

Where trustees of corporate property release the lien of a mortgage upon certain lands to be defined by inquisition, in consideration of certain added rights of enforcing the mortgage against the remainder, the Legislature cannot afterwards require the lease of additional lands on the ground that a mistake was made in the inquisition, such action being an impairment of the obligation of the contract.[81]

Certain bonds were payable "at the expiration of five years

(77) Byers *v.* Union Trust Co., 175 Pa., 318 (1896).
(78) McElrath *v.* Pitts. & S. R. Co., 68 Pa., 37 (1871).
(79) Bradley *v.* Chester Valley R. R. Co., 36 Pa., 141 (1860).
(80) Patterson *v.* Hempfield R. Co., 1 W. N. C., 127 (1874).
(80*) Com. ex rel. *v.* Altoona & Philipsburg Connecting Ry. Co., 31 Pa. C. C., 647 (1905).
(81) Drew *v.* N. Y. & E. R. Co., 81* Pa., 46 (1870).

from date hereof" with "interest thereon at the rate of seven per cent. per annum, payable semi-annually," etc. The mortgage securing the bonds provided, *inter alia,* that in case of default in paying the semi-annual interest, the trustees should, upon request, notify the society issuing the bonds of such breach, and after the lapse of six months issue a sci. fa. on the mortgage, for the purpose of paying the interest due and the principal thereof, pro rata. Held, that such proceeding is not the only remedy. An action lies for the interest which is due, though the principal be not now due and payable.[82]

A supplement to an act incorporating a railroad company authorized the company to mortgage the road and any real or personal property belonging to it, for "the purpose of carrying out the privileges granted by the act, and the several supplements thereto, incorporating the same." Said supplements and later ones authorized various extensions of the railroad. Held, that the power to mortgage extended to future extensions of the railroad, subsequently authorized, and all other real and personal property of the company, without regard to the time of acquisition. It was not exhausted when the railroad, as authorized at the date of the supplement was completed, but justified a mortgage to carry out any power then or afterward granted to the company.[83]

A corporation mortgaged "all and singular the estate and property, real, personal and mixed" of the company, "together with all and singular the lands, etc., rights, interests and real estate, etc., of and belonging to said parties of the first part of every kind, nature and character." The company having power to mortgage all its property, and the instrument having embraced therein everything of a real and personal nature, it is immaterial whether the real property in question was necessary to the use and enjoyment of the railroad, or not. Being included in the mortgage it was in legal custody, and could not be levied on.[84]

Where a corporation transferred its property to trustees by certain mortgage deeds of trust to secure the payment of certain bonds, it was held that as to personal property remaining in the hands of the company, the trustees and mortgagees had no pri-

(82) Montg. County Agrl. Soc. *v.* Francis et al., 103 Pa., 378 (1883).

(83) Gloninger *v.* Pitts. & Conn. R. Co., 139 Pa. 13 (1891).

(84) Robinson *v.* Atl. & Great Western Ry. Co., 66 Pa., 160 (1870).

ority of claim over a lien creditor, until the mortgages were foreclosed and the trustees or mortgagee put in possession.[85]

Where a corporation mortgage provides that the trustee shall not certify an issue of bonds until money sufficient to pay the first four coupons has been paid to the trustee, and the trustee by the direction of the corporation agrees to hold certain bonds in trust to secure the performance of a contract on the part of the corporation, without requiring the deposit of any money to pay the first four coupons, the person for whom the bonds are held in trust cannot maintain a bill in equity against the trustee to recover damages for failure to have in hand the money for the coupons, or for alleged false allegations as to title of the mortgaged premises made by the trustee to such person.[85*]

Where a trustee of a corporation mortgage agrees not to issue bonds until a sum sufficient to pay the first four coupons are deposited with it, and certain persons to whom the bonds are issued deposit the amount of the four coupons, and subsequently receives such amount back, the trustee is not liable to other parties for such payment.[85**]

373. Foreclosure of Corporate Mortgages.

It was held in a number of cases[86] that the power to decree the sale of mortgaged property of corporations in equity had not been given to the courts. These decisions led to the passage of the Act of April 11, 1862, P. L., 477, conferring upon the Supreme Court the powers of a court of chancery in all cases of mortgages given by corporations. This act was held not to impair the obligation of contracts, but to be merely remedial for breach of covenant.[87] The Act of April 11, 1862, was repealed by implication by Sec. 3 of Art. 5 of the Constitution of 1874, limiting the original jurisdiction of the Supreme Court, but practically the same jurisdiction was conferred upon the Courts of Common Pleas by

(85) Merchants' Bank *v.* Petersburg R. R. Co., 4 W. N. C., 264 (1877).

(85*) Sprigg *v.* Commonwealth Title & Ins. Co., 206 Pa., 548 (1903).

(85**) Sprigg *v.* Commonwealth Title & Ins. Co., 206 Pa., 548 (1903).

(86) Ashhurst *v.* Montour Iron Co., 35 Pa., 30 (1860); Bradley *v.* Chester Valley R. R. Co., 36 Pa., 141 (1860); Mendenhall *v.* West Chester etc. R. Co., 36 Pa., 145 (1860).

(87) McElrath *v.* Pitts. & S. R. Co., 55 Pa., 189 (1867); McCurdy's Ap., 65 Pa., 290 (1870).

the Acts of May 5, 1876, P. L., 123; March 23, 1877, P. L., 32, and June 24, 1885, P. L., 151, supra.[88]

Foreclosure may be for failure to pay interest,[89] and where it is for interest only, and the property is sold, the surplus is properly to be paid on the principal,[90] and the whole property may be sold to pay the interest, though the principal is not yet due.[91]

A court may order the sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the premises in the hands of the purchaser as to the unmatured part of the debt, as well as to coupons.[92]

Where a street railway company leases its power house and machinery to an electric light, heat and power company, and the lessee covenants to supply the lessor with power to run its cars, to keep the property leased in good repair, and to restore the same in good condition at the end of the term, to pay net receipts to the lessor to be applied to the payment of the coupons on the lessor's bonds, and to pay taxes on the leased property, and the lessee executes a mortgage to the lessor as security for faithful compliance with the terms of the lease, such mortgage may be foreclosed where it appears that the lessee failed to rebuild the power house after it had been destroyed by fire, and failed to pay certain expenses incident to the proper care of the leased property, which the lessor paid for it, and that the lessee failed to pay taxes on the property and applied some of the net receipts to paying for betterments and improvements.[93]

The proper proceeding against a trustee in a corporate mortgage who is alleged to have received, in foreclosure proceedings, more than was proper, is by a petition under the Act of June 14, 1836, P. L., 628, for a citation to file an account and not by a bill in equity.[93*]

When purchasers of a railroad on the foreclosure of a mortgage use bonds as purchase money, under a decree of court authorizing

(88) See Sec. 342.

(89) Penna. Co. *v.* Phila. R. R., 69 Fed. Rep., 482 (1895).

(90) Pa. R. Co. *v.* Alleg. etc. R. R. Co., 48 Fed. Rep., 139 (1891).

(91) West Branch Bank *v.* Chester, 11 Pa., 282 (1849); Mendenhall *v.* W. Chester R. Co., 36 Pa., 145, *note*.

(92) Pa. R. R. Co. *v.* Allegheny etc. R. R. Co., 48 Fed. Rep., 139 (1891).

(93) Gettysburg Elec. Ry. Co. *v.* Elec. Lt., Ht. & Pr. Co. of Gettysburg, 200 Pa., 372 (1901).

(93*) Merchants' Trust Co. *v.* Real Estate Trust Co., 215 Pa., 56 (1906).

the same, and the amount due upon the bonds has been specifically fixed by the court, and the purchasers, relying on the decree, have purchased bonds designated therein, applied them on their bid, received a deed for the property, formed a new corporation and spent large sums of money, other bondholders who had full notice of the decree and proceedings thereunder, and of the action of the purchasers, have no standing, long after the transaction has been consummated, to petition the court to change the decree so as to correct an alleged inequality among the bondholders.[93**]

A court of equity has jurisdiction to entertain a bill filed by a trustee under a corporation mortgage at the request of bondholders for necessary foreclosure and for the sale of the mortgaged property clear of its lien and an accounting and distribution of the proceedings among bondholders and creditors.[93***]

374. Fraudulent Foreclosures.

Where a foreclosure sale is fraudulent, the remedy is not ejectment, but in equity to set aside the sale.[94]

A stockholder is not allowed to intervene in a fraudulent foreclosure suit. His remedy is to have the judgment set aside for fraud.[95] The weight of authority elsewhere, however, is that he may intervene, in such case.[96]

375. Foreclosure of Mortgages on Property of Railroads Operating in Other States.

A court of Pennsylvania may, on the foreclosure of a railroad mortgage, order the sale of the whole road, though a part of it be in another State, the decree operating upon the resident trustee, to authorize and compel him to sell and convey whatever interest of the railroad company would pass under the mortgage.[97] And a Circuit Court of the United States in Pennsylvania may foreclose a mortgage on the property of a railroad company running through New York and Pennsylvania.[98] A United States Court

(93**) Real Estate Trust Co. *v.* Perry Co. R. R. Co., 213 Pa., 57 (1905).

(93***) Girard Trust Co. *v.* Avonmore Land & Impt. Co., 16 D. R., 810 (1907).

(94) New Castle Northern Ry. Co. *v.* New Castle & Shenango Val. R. Co., 152 Pa., 96 (1892); 30 W. N. C., 507.

(95) Gravenstine's Appeal, 49 Pa., 310 (1863).

(96) Cook on Corpns., Sec. 848.

(97) McElrath *v.* Pitts. & S. R. Co., 55 Pa., 189 (1867).

(98) Woodbury *v.* Allegheny etc. R. Co., 72 Fed. Rep., 371 (1895).

sitting in Pennsylvania may foreclose a mortgage on the property of a railroad company running through Pennsylvania and Maryland.[99]

376. Mortgage Liens.

A judgment for the price of land appropriated by a corporation under the right of eminent domain has priority over the lien of a mortgage of prior date. The title to the land does not pass until the compensation therefor is secured, and then vests subject to the lien.[100]

Where bonds were issued secured by mortgage to an amount largely in excess of the amount authorized by law, held, that as between innocent holders of such bonds, and creditors who had become such after the execution of the mortgage and with notice thereof, the lien of the mortgage took precedence.[1]

A decree declaring a corporate mortgage a first lien is not binding as against a prior lien of one who had no notice of the proceeding in which the decree was rendered, and was not a party or privy to such decree.[2]

The garnishees in a foreign attachment against a corporation set forth in their answer that the debtor corporation had transferred all its property, real and personal, by a mortgage to secure the payment of a bond issue. Held, that as to personal property of the corporation not in possession of the mortgagees, the liens of the creditors, obtained by judicial process, would take precedence of the mortgage.[3]

377. Conflict Between Contractors' Liens and Mortgage Liens.

The lien of a mortgage executed by a railroad corporation is subordinate to the lien of a contractor for the construction of the roadway under the Resolution of January 21, 1843, P. L., 367, and the Act of April 4, 1862, P. L., 235.[4] But where the con-

(99) Randolph *v.* Wilmington & R. R. Co., U. S. Cir. Ct., 11 Phila., 502 (1876).

(100) Easton Boro's Appeal, 47 Pa., 255 (1864).

(1) Fidelity Ins. etc. Co. *v.* West Penn. & S. C. R. Co., 138 Pa., 494 (1891).

(2) Pitts., C. & St. L. R. Co. *v.* Marshall, 85 Pa., 187 (1877).

(3) Merchants' Bank *v.* Petersburg R. Co., 12 Phila., 482 (1877).

(4) Shamokin Valley & P. R. Co. *v.* Malone, 85 Pa., 25 (1877); Tyrone & C. R. Co. *v.* Jones, 79 Pa., 60 (1875); Pitts., C. & St. L. R. Co. *v.* Marshall, 85 Pa., 187 (1877).

tractors having a prior lien are made parties to the mortgagee's foreclosure suit, and they do not defend, independent proceedings by them eleven years later to enforce their lien will fail.[5] And where the mortgage is executed before the contractor begins work its lien takes precedence of his.[6]

Where work was done by a contractor for a railroad company, and the said company, without his knowledge or assent, having subsequently made a mortgage upon which proceedings were begun and resulted in a sheriff's sale, it was held that, although the purchaser at such sale had no notice of the contractor's claim, the mortgage and the judicial sale under it were void so far as regarded the paramount lien of his claim.[7]

378. Remedies of Bondholders.

As a rule the bondholders are bound by the action of the trustee within the scope of his authority,[8] but, if the trustee neglects or refuses to move, any bondholder may proceed by bill filed on behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee or such other relief as may be appropriate.[9] A bondholder bringing suit to compel the recording of a deed in trust securing his bond, must prove the due execution of the deed in trust, and must make subsequent mortgagees parties defendant.[10]

Where a corporate mortgage contains a provision that it may be foreclosed for failure of the corporation to discharge its obligations thereunder at the election of the mortgagee, or on prayer of one-third of the bondholders, it cannot be foreclosed on the petition of less than the required number of bondholders.[11] Where a minority of the bondholders of a public corporation have stood by and seen the great majority of bondholders and creditors bind themselves to a scheme of finance which (though not in accordance with the strict terms of the mortgage) promises best for the interests of all parties, such minority will be left to their reme-

(5) Woods *v.* Pitts., Cin. & St. L. Ry. Co., 99 Pa., 101 (1881).
(6) Reed's Appeal, 122 Pa., 565 (1888).
(7) Shamokin Valley & P. R. Co. *v.* Malone, 85 Pa., 25 (1877).
(8) McElrath *v.* Pitts. etc. R. Co., 68 Pa., 37 (1877).
(9) Com. *v.* Susquehanna etc. R. Co., 122 Pa., 306 (1888).
(10) Reggs *v.* Pa. etc. R. Co., 16 Fed. Rep., 804 (1883).
(11) Humes *v.* Company et al., 2 D. R., 107 (1892).

dies at law on the mortgage securing the bonds, and have no right, in addition to such remedies, to an injunction to defeat the proposed arrangement.[12]

In proceedings to declare a corporate mortgage void the holders of the bonds secured by it must be joined, and service had on them as well as upon the trustees.[13]

379. Where Money is Borrowed in Excess of the Amount Authorized by Law.

A mortgage given for a greater amount than the corporation giving it is authorized by law to have, is unauthorized, and might be held as inoperative and void as to parties having the right to complain, but as between *bona fide* holders of the mortgage bonds and the company, the mortgage is a lien upon the mortgaged property. Subsequent creditors of the company, who became such with notice of the mortgage, while the negotiation of the bonds was in progress, occupy no better position than the company itself, and cannot set up its fraud in exceeding the authority conferred, as a defense against the victims of that fraud.[14]

Where a corporation authorized by statute to borrow a certain sum, borrows an amount in excess thereof, which is applied to corporate purposes, it cannot set up the defense of *ultra vires* in an action to recover the excess. An act authorizing a corporation to borrow a certain sum does not necessarily render a borrowing in excess thereof *ultra vires*. A corporation which, through the action of its directors, has co-operated in making a mortgage in good faith of the corporate realty, cannot, after receiving the loan, claim, seven years later, that the act of the trustee in making a mortgage for an amount in excess of that permitted by statute is not binding upon it.[15]

380. Where "Par Value of Capital Stock" is Made the Measure of the Authorized Amount of Indebtedness.

A railroad company was authorized by its charter to borrow money in any sum not exceeding in amount one-half the par value

(12) Buckley *v.* Union Canal Co., 3 Phila., 152 (1858).

(13) Harrisburg & Eastern R. Co.'s Ap., 1 Mona., 692 (1888).

(14) Fidelity I., T. & S. D. Co. *v.* West Penn. & S. Con. Ry. Co., 138 Pa., 494 (1890).

(15) Union Trust Co. *v.* Mercantile Library Hall Co., 189 Pa., 263 (1899).

of the capital stock; held, that the words "par value of the capital stock" must be held to mean capital actually paid in, and not "authorized capital," and that the company, therefore, had no right to issue bonds to a greater amount than one-half of the paid-up capital.[16] See Sec. 355.

381. Purchasers at Foreclosure Sales.

The purchasers of the franchises and property of a corporation at foreclosure sales take the same free from all debts of the mortgagor company which were not secured upon the property by a lien paramount to the foreclosed mortgage, unless a court has required the payment of such debts as a condition of appointing a receiver, or unless the payment is part of the scheme of foreclosure and reorganization.[17]

But the purchaser of corporate property and franchises at a foreclosure sale is liable for damages for land taken by the mortgagor company under the right of eminent domain,[18] and where the mortgagor company had entered into an agreement for the purchase of certain lands at a given price, held, that the purchaser at the foreclosure sale must comply with such agreement or surrender the land.[19] Where, however, a bond is given by the mortgagor corporation for the payment of damages for land taken under the right of eminent domain, he cannot recover such damages from the corporation purchasing the property at foreclosure sale, but is limited to his remedy on the bond.[20]

And the amount of a judgment against the mortgagor company for trespass in entering upon plaintiff's lands and constructing its road thereon, cannot be recovered against a company purchasing the property and franchises of said mortgagor company at a foreclosure sale made under a decree providing "That any

(16) Com. *v.* Lehigh Ave. Ry. Co., 129 Pa., 405 (1889); 24 W. N. C., 530; 6 Pa. C. C., 557 (1889).

(17) Thomp. Corpns., Secs. 263, 267, 6237; Stewart's Ap., 72 Pa., 291 (1873); Houston *v.* Clark, 162 Pa., 435 (1894); Pa. Transp. Co. *v.* Pitts. T. & B. Co., 29 Pitts. L. J., 98 (1881). See Catawissa R. R. Co. *v.* Titus, 49 Pa., 277 (1865).

(18) Buffalo, N. Y. & P. R. Co. *v.* Harvey, 107 Pa., 319 (1884); Western Pa. R. Co. *v.* Johnson, 59 Pa., 290 (1869); Lycoming Gas & Water Co. *v.* Moyer, 99 Pa., 615 (1882); 11 W. N. C., 443.

(19) Wheeling, P. & B. R. Co.'s Ap., 1 Penny., 360 (1881).

(20) Fries *v.* Southern Pa. R. & Min. Co., 85 Pa., 73 (1877).

purchaser . . . . shall take . . . . subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as also all unpaid claims of land owners for damages for property taken, injured or destroyed in the construction of the railroad," especially when, after the judgment and before the sale, the plaintiff had granted a right of way to the mortgagor company.[21]

The purchasers of property and franchises of a quasi public corporation, on the foreclosure of a mortgage on its property and franchises, do not thereby become a corporation or acquire the name of the mortgagor company, and their duties cannot be enforced in a suit against said company. Where injuries arise from the failure of the purchaser, in operating under the franchise, to perform duties originally incumbent upon the mortgagor company, they should be sued in their own name.[22]

Under the Act of April 20, 1846, P. L., 412, relating to sheriffs' returns, where the execution creditor purchases the property and franchises of a corporation, a creditor whose debt is secured by a judgment subsequent in date to the mortgage upon which the execution proceedings were conducted, has no standing to except to the sheriff's return. It seems that if the mortgage were invalid and collusive, the property of the defendant in the execution is not divested by the sale as against *bona fide* creditors; if valid, that the petitioner cannot attack the incorporation of the company nor the creation of the mortgage indebtedness.[23]

The fact that the property of a corporation is bought at a foreclosure sale by bondholders, stockholders and a majority of the general creditors,[24] or that the mortgage under which the sale was held was given by a corporation to secure a debt due by the corporation to a creditor who is also a principal stockholder,[25] will not invalidate the sale in the absence of fraud.

382. Foreign Corporations May Foreclose Mortgages.

Although foreign corporations, except those belonging to classes

(21) Campbell *v.* Pitts. & W. Ry. Co., 137 Pa., 574 (1890).

(22) Wellsborough & Tioga Plank Road Co. *v.* Griffin, 57 Pa., 417 (1868).

(23) Mellon *v.* Shenango Nat. Gas Co., 157 Pa., 627 (1893).

(24) Gloninger *v.* Pitts. & C. R. Co., 139 Pa., 13 (1891).

(25) Leasure *v.* Union Mut. Ins. Co., 8 W. N. C., 429 (1879); Amer. Slate Co. *v.* Phillipsburg B. & L. Savings Bank, Id., 430 (1879).

specially permitted to do so, may not hold real estate in Pennsylvania, they may, nevertheless, bring ejectment and recover possession of the mortgaged property. Their title is good as against any one but the Commonwealth.[26]

383. Apportionment of Interest on Bonds between Life Tenant and Remainderman.

The interest on municipal bonds, or bonds of private corporations, is apportionable between a remainderman and the executor of the holder of the life estate.[27]

384. Transfer and Conversion of Bonds.

M appointed C her general attorney in fact to sell and transfer all stock or loans owned by her, with power of substitution. C appointed V his substitute, and died. After C's death, V transferred certain loans of M and embezzled the proceeds. Held, that the corporation permitting this transfer was liable to M for the value of the loans. The powers of the substitute of an attorney in fact cease upon the death of such attorney.[28]

The mere fact that one who wrongfully pretends to act for another in transferring her securities, has possession of her certificates of loan and presents them to the officers of the company for transfer, does not of itself justify the officers in making a transfer of the loan on the books of the company.[29]

A bond issued by a railroad company recited that the holder might at any time after fifteen years from its date convert the principal sum into preferred stock of the company. At the said date the company had no preferred stock, but by the acceptance of an act previously passed, it could immediately acquire such right. Held, that at the expiration of fifteen years the company must comply with a demand of a bondholder for the conversion of bonds into stock, or answer in damages to the extent of the market value of the stock at the date of demand.[29*]

385. Municipal Bonds Sold Below Par in Violation of Statute.

Where bonds issued by a county in payment of its subscription

(26) Pa. Trans. Co. *v.* Pitts. T. & B. R. Co., 29 Pitts. L. J., 98 (1881).
(27) Wilson's Appeal, 108 Pa., 344 (1885).
(28) Lehigh Nav. Co. *v.* Mohr, 83 Pa., 229 (1877).
(29) Lehigh Nav. Co. *v.* Mohr, 83 Pa., 229 (1877).
(29*) Bratten *v.* Catawissa R. R. Co., 211 Pa., 21 (1905).

to the stock of a railroad company were sold below par, in violation of the statute authorizing their issue, the county may by proceeding in equity compel the holders to receive in satisfaction of the bonds the sum paid by the first purchasers with interest thereon.[30]

Continuous and uninterrupted possession of bonds for nearly thirty-one years is sufficient evidence of ownership though the bonds are registered in the name of another person.[31]

386. Scrip.

Scrip is a certificate that the holder is entitled to shares of stock or bonds of a corporation.

Where scrip certificates are secured by a corporation mortgage, but the holders thereof are entitled to have them converted into bonds, which will be secured by the mortgage, and such holders, who are also holders of bonds, intervene in foreclosure proceedings and permit a decree to be entered and a sale to be made, without demanding bonds in exchange for their scrip, or in any way asserting their right to the security of the mortgage, except with regard to the bonds held by them, they will not be permitted to participate in the fund for distribution as if their scrip had been converted into bonds, under the equitable rule that equity regards that as done which ought to have been done. In such case the failure of the scrip holders to act may have influenced other bondholders in their bidding or not bidding at the sale.[32]

A bill in equity against a corporation to compel the specific performance of a contract by which the corporation had agreed to issue bonds for scrip, cannot be maintained where it appears that the mortgage securing the bonds has been foreclosed, that the plaintiffs participated in the foreclosure proceedings by petition for leave to intervene, knew of the amount of bonds included in the decree, permitted the property covered by the decree upon the mortgage to be sold, and filed the bill before distribution.[33]

(30) County of Armstrong *v.* Brinton, 47 Pa., 367 (1864).

(31) Cumming's Estate, 153 Pa., 397 (1893).

(32) Girard Trust Co. *v.* Summit Branch Coal Co., 22 Pa. Super. Ct., 495 (1903).

(33) Rommel *v.* Summit Branch Coal Co., 18 Pa. Super. Ct., 482 (1901).

CHAPTER XVIII.

DIVIDENDS.

387. Definitions.
388. What Are and What Are not Dividends.
389. Stock Dividends.
389a. Scrip Dividends.
390. Power to Declare Dividends Discretionary with Directors.
391. Dividends May not be Declared Impairing the Capital Stock.
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393. Statute of Limitations.
394. Application of Dividends to Payment of Indebtedness of Stockholder to the Corporation.
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396. Dividends May be Declared by Corporations not for Profit.
397. Who is Entitled to Dividends.
398. Distribution of Dividends Between Life Tenant and Remainderman.
399. Liability of Directors of Manufacturing, Mechanical, etc., Companies for Declaring Dividends When Their Companies are Insolvent.
400. Dividends on Pledged Stock.

387. Definitions.

A dividend is that portion of the profits and surplus funds of a corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively.[1]

A dividend is a share of a sum divided that falls to each individual; a distributive sum, share or percentage applied to the profits as apportioned among the stockholders. It differs from profits in being taken by a competent authority out of the joint

(1) 2 Thomp. Corpns., Sec. 2128. This definition was used by Reeder, Secretary of the Commonwealth, in Phillipsburg Water Co. *v.* Citizens' Water Co., 18 Pa. C. C., 625 (1897), without acknowledgment, and is approved by the Supreme Court in Rose *v.* Barclay et al., 191 Pa., 594 (1899), being credited by the court to a Pennsylvania text writer.

property of the partnership or company and transferred to the separate property of the undivided partners or stockholders.[2]

The word "dividends," however, when unqualified, does not necessarily mean dividends declared from profits, but may mean, as well dividends from the assets of a corporation gone into liquidation.[3]

It has been held in tax cases that a nominal or arithmetical increase of shares, without transferring to the stockholders anything out of the treasury or property of a corporation, is not a dividend or profit either made or declared.[4]

388. What Are and What Are Not Dividends.

A corporation declared no dividends but permitted its stockholders to draw as "interest" thereon an amount equal to five per cent. upon the value of the shares held by each respectively, though the earnings amounted to more. A drew from time to time amounts in excess of five per cent. upon the value of his stock, but not in excess of the proportion of the earnings to which his shares would have entitled him had the same all been divided among the stockholders. Held, that the amount drawn by him in excess of said five per cent. constituted a debt to the company, and upon the reorganization of the company and the issue of new shares in place of the old, that the company was justified in issuing to him stock to the value of the original stock held by him less the amount of said indebtedness.[5]

A traction company leased a street railway company and exchanged its shares of stock for the street railway company's shares, in the proportion of eight to one. The railway company's stock became an asset of the traction company, and was pledged as collateral security for its bonds. Held, that the whole transaction was a change of ownership in the same property, and not the declaration of a dividend, either in form or substance.[6]

(2) City of Allegheny *v.* Pitts., Alleg. & M. Pass. Ry. Co., 179 Pa., 414 (1897).

(3) Cozad *v.* McKee, 130 Pa., 406 (1889).

(4) Com. *v.* Pitts., Ft. W. & C. R. Co., 74 Pa., 83 (1873); Alleg. City *v.* Fed. St. & Pleasant Valley Ry. Co., 179 Pa., 424 (1897); Com. *v.* Erie & Pitts. R. Co., 74 Pa., 94 (1873).

(5) Reading Trust Co. *v.* Reading Iron Works, 137 Pa., 282 (1890).

(6) City of Allegheny *v.* Pitts., Alleg. & Man. St. Ry. Co., 179 Pa., 414 (1897).

The said company also transferred to the traction company the shares of a third railway company, and some real estate, in alleged consideration of the issue of additional shares of its stock to stockholders of the railway company. Held, that such an agreement would seem to work a severance of these shares from the corporate property, and a distribution of the value of the shares of the third company among the stockholders, and was, therefore, a dividend.[7]

389. Stock Dividends.

A stock dividend is a dividend payable in reserved or additional stock of a corporation, instead of in cash or property, which can be declared only when a corporation has reserve stock which it can lawfully issue, or when it is authorized to increase its capital stock. In such case, in the absence of constitutional or statutory prohibition, if the directors of the corporation acting in good faith are of the opinion that it is for the best interests of the corporation and its stockholders to retain profits in the business of the corporation, or as a surplus fund to meet future needs, instead of dividing it among the stockholders as a dividend in cash or property, it is within their discretion to do so and to pay a dividend by issuing reserved or additional stock.[8]

There are numerous decisions in Pennsylvania as to what constitutes stock dividends for purposes of taxation, but as the tax on capital stock has not been settled on a dividend basis since the passage of the Act of June 1, 1889, P. L., 420, they are not now of much interest. Some of them are referred to in the note.[9]

In Alabama, where the provision in regard to fictitious increases of stock is the same as that in Pennsylvania, it was held that a corporation with a capital stock of $10,000 had no authority to double its capital stock and distribute the stock among its stockholders as a stock dividend, on the mere statement that its capital stock had been invested in property which had more than

(7) City of Allegheny *v.* Pitts., Alleg. & Man. St. Ry. Co., 179 Pa., 414 (1897).

(8) Clark & Marshall's Private Corpns., Sec. 523.

(9) Com. *v.* Pgh., Ft. W. & Ch. Ry. Co., 74 Pa., 83 (1873); Com. *v.* Cleveland, P. & A. R. R. Co., 29 Pa., 370; Lehigh Crane Iron Co. *v.* Com., 55 Pa., 448 (1867); City of Allegheny *v.* Fed. St. & Pl. V. Pass. Ry. Co., 179 Pa., 424 (1896); Same *v.* R. R. Co., Id., 414; Com. *v.* Western Union Teleg. Co., 15 W. N. C., 331 (1884).

doubled in value and was then worth $20,000 over and above all liabilities.[10]

The general rule is, that a stockholder has a vested right in a dividend when the same has been fully declared by the directors and publication of the declaration has been made, and that the directors cannot thereafter reconsider their action and revoke the declaration without the stockholders' consent.[11] And it has been held in Pennsylvania that a resolution of a board of directors of a corporation distributing among the stockholders shares of stock of the company which had been taken in payment for money loaned by the company out of its earnings, cannot be subsequently rescinded, where it is not shown that such distribution would be injurious to the business of the company, upon the ground, it would seem, that the shareholders acquired a vested right in such shares by the passage of the resolution.[12]

Where a corporation set apart as capital a fund accumulated from the rental of its cars, and subsequently, in good faith, in reduction of its capital stock, paid therefrom to its stockholders twelve dollars per share, reducing the par value of each share by that amount, held, that such payment did not amount to a stock dividend.[13]

389a. Scrip Dividends.

"A scrip dividend is a dividend of certificates giving the holder certain rights which are specified in the certificate itself. These dividends are usually declared when the company has profits which are not in the shape of money, but are in other forms of property, and the company wishes to anticipate the time when the property may be sold for cash, and the cash distributed by a money dividend. . . . . Some times the certificate so far partakes of the character of a certificate of stock as to entitle the holder to dividends. . . . . A dividend of scrip, *i. e.*, a paper entitling the holder to dividends equal to dividends thereafter declared on the capital stock, is practically a stock dividend, except that the

(10) Fitzpatrick *v.* Dispatch Pub. Co., 83 Ala., 604.
(11) Clark & Marshall's Private Corpns., Sec. 517d.
(12) Dock *v.* Schlichter Jute Cordage Co., 167 Pa., 370 (1895).
(13) Com. *v.* Central Transp. Co., 145 Pa., 89 (1891).

scrip cannot vote, and provision is generally made for taking it up in some manner." [13*]

390. Power to Declare Dividends Discretionary With Directors.

The directors of a corporation have the discretionary power to determine not only the amount of all dividends, including those on preferred stock, but also whether they will or will not, under given circumstances, declare any dividend; but they may not refuse to declare, or declare them, arbitrarily, nor when, in view of all considerations they ought to grant them. Their action in declaring or not declaring dividends is subject to review by the courts, but, within the regulated limits of their discretion, they have the exclusive control of the whole matter, and their action is binding on the stockholders.[14]

391. Dividends May Not be Declared Impairing the Capital Stock.

Various enactments provide that dividends shall be payable only from net profits, or forbid the declaration of dividends impairing the capital stock of corporations, frequently making the directors consenting to the declaration of such dividends individually liable to such companies for the amount of capital stock so divided. Such enactments and the classes of corporations to which they respectively refer are as follows:—

Street railway companies: Sec. 11, Act May 14, 1889, P. L., 211.

Gas and water companies formed under special acts: Sec. 13, Act March 11, 1857, P. L., 77.

Bridge companies: Secs. 1 and 7, Act May 1, 1876, P. L., 84.

Insurance companies: Sec. 26, Act May 1, 1876, P. L., 53.

Canal and railroad companies: Sec. 7, Act February 19, 1849, P. L., 79.

Manufacturing, etc., companies: Sec. 39, Act April 29, 1874, P. L., 73.

Banks: Secs. 16 and 24, Act May 13, 1876, P. L., 161.

And even in the absence of any statutory prohibition, it is a general principle of law that a corporation may not lawfully de-

(13*) Cook on Corpns., Sec. 535, cited with approval in Robinson's Trust, 218 Pa., 485 (1907).

(14) McLean et al. *v.* Pitts. Plate Glass Co., 159 Pa., 112 (1893).

clare dividends out of its capital stock and thereby reduce the same,[15] except in the case of corporations the property of which is necessarily consumed in the course of operations, such as land companies and mining companies.[16]

In an action by a stockholder to recover a dividend, an affidavit of defense alleging an agreement on the part of the plaintiff and others to allow their dividends to accumulate for the benefit of the company and to take additional stock therefor, is sufficient.[17]

392. Method of Recovering Dividends.

A suit to enforce the declaration of dividends must be in equity, but, after a dividend has been declared, the remedy of the stockholder to recover his proportion of the same is an action at law.[17*]

An affidavit of defense, in an action against a corporation on a promissory note given for dividends which had been held lawfully declared by a judgment of court, is insufficient which avers that such dividends had not been earned, but were made to appear to have been so by fictitious inventories. So long as such judgment stands the defendant corporation can make no defense upon the grounds stated.[17**]

A shareholder cannot ordinarily sue a corporation for his share of accumulated profits until a dividend has been declared, a matter which generally rests within the discretion of the directors, which discretion the courts will not control unless it has been plainly abused.[17***]

393. Statute of Limitations.

"It may well be doubted whether, under our acts of assembly, any incorporated company can set up the statute of limitations against a stockholder's dividend. It certainly cannot be done until

(15) Clark & Marshall's Private Corpns., Sec. 519; Cook on Corpns., Sec. 546.

(16) Clark & Marshall's Private Corpns., Sec. 520i.

(17) Noren *v.* Star Enameling & Stamping Co., 34 Pa. C. C., 236 (1907).

(17*) Cook on Corpns., Sec. 542; West Chester etc. R. Co. *v.* Jackson, 77 Pa., 321 (1875).

(17**) Camden Nat. Bank *v.* Fries-Breslin Co., 214 Pa., 395(1906).

(17***) Corgan *v.* Geo. F. Lee Coal Co., 218 Pa., 386 (1907).

after a demand and a refusal or notice to the shareholder that his right to dividends is denied." [18]

394. Application of Dividends to Payment of Indebtedness of Stockholders to the Corporation.

Where a stockholder subscribes for additional stock and fails to pay the calls thereon the company may appropriate the dividends declared upon the stock originally held by such stockholder to the payment of the calls upon the new.[19] In the case of savings banks with capital stock, there seems to be no lien in favor of the bank on such stock to secure the payment of the indebtedness of the stockholder to the bank.[20]

395. Interest on Dividends.

Interest is not recoverable on dividends until after demand for payment and refusal to pay.[21]

396. Dividends May be Declared by Corporations Not for Profit.

It is an inherent right of any corporation to divide its gains and profits among its members. A corporation instituted to protect the owners of houses from loss by fire, without any view of private gain or interest, which has, as the result of prudent management, accumulated so large a fund as to make it safe and prudent to divide the net income from its invested funds, may make such dividend to its members. Unanimity in the government of a corporation is not required unless its charter so provide. It is one of the consequences of being a stockholder or member of a corporation that the will of a majority shall govern unless fundamental principles provide otherwise. A resolution adopted unanimously at a stockholders' meeting may be revoked at a subsequent meeting by a resolution not unanimously adopted.[22]

(18) Phila., Wil. & Balto. R. Co. *v.* Cowell, 28 Pa., 329 (1857).

(19) Phila., Wil. & Balto. R. Co. *v.* Cowell, 28 Pa., 329 (1857).

(20) Bank of Easton *v.* Shouse, 102 Pa., 488 (1883).

(21) Phila., Wil. & Balto. R. Co. *v.* Cowell, 28 Pa., 329 (1857); Dingertz *v.* Sterlingworth Ry. Supply Co., 15 D. R., 791 (1906). See Steamship Dock Co. *v.* Heron's Admx., 52 Pa., 280 (1866).

(22) McKean *v.* Biddle et al., 181 Pa., 361 (1897). In the decision of this case below the court says: "Every business or trading corporation has a right to declare and pay dividends to its members (Morawitz on Corp., Sec. 446; Thompson on Corp., Sec. 2128), and it has also the right to pass its dividends for a time in order to accumulate a surplus and

397. Who is Entitled to Dividends.

The transferee of shares of stock is entitled to all the dividends of stock declared after the sale thereof, even though the transfer has not been recorded,[23] and regardless of the fact that the profits from which such dividends were declared accrued prior to the sale of the stock,[23*] although until the corporation receives notice of an assignment it is bound to pay dividends to the parties who appear by the stock book to be the owners of the shares;[24] but after notice of a transfer the corporation must pay dividends to the transferee, although no registry has been made.[25]

A contract in writing for the sale of a certain number of shares of stock "including all dividends due or to become due thereon," carries with it a stock dividend which had been declared prior to the date of the contract, and a court of equity will enforce a transfer of the stock represented by the dividend, though the vendor did not know that such a dividend had been declared, while the vendee, who had knowledge, was silent,[26] but as between the vendor and vendee of stock the title to dividends already declared does not pass by a sale, unless specifically contracted for. There can be no apportionment of them.[26*]

398. Distribution of Dividends Between Life Tenant and Remainderman.[27]

399. Liability of Directors of Manufacturing, Mechanical, etc., Companies for Declaring Dividends When Their Companies are Insolvent.[28]

strengthen the company. . . . Having accumulated enough, in the judgment of the members, to make it safe and prudent to resume the division of its profits, it has the right to make such division. (McLean *v.* Pitts. Plate Glass Co., 159 Pa., 112). The basis of the division is a matter for the members to decide." McKean *v.* The Phila. Contributionship for the Insuring of Houses from Losses by Fire, 6 D. R., 40 (1897).

(23) Cook on Corpns., Sec. 539.

(23*) Corgan *v.* Geo. F. Lee Coal Co., 218 Pa., 386 (1907).

(24) Bell *v.* Lafferty, 1 Penny., 454 (1881); Bank of Commerce's Appeal, 73 Pa., 59 (1873).

(25) Cook on Corpns., Sec. 538.

(26) Rose *v.* Barclay et al., 191 Pa., 594 (1899).

(26*) Dingertz *v.* Sterlingworth Ry. Supply Co., 15 D. R., 791 (1906).

(27) See Sec. 266.

(28) See Sec. 191.

400. Dividends on Pledged Stock.

Where stock held as collateral stands in the name of the pledgee, he is entitled to the dividends, and where they have been paid to the pledgor without the consent of the pledgee, he may sue the company for the amount thereof, and this is so, even where, after declaration and payment of dividends, the pledgor pays part of the debt and the pledgee surrenders the old collateral note and takes a new one with more stringent terms for the balance, both notes pledging the stock as collateral, and the stock continuing in the name of the pledgee, if the new note is taken as part renewal of the old; and whether it be, or not, is for the jury.[29]

(29) Boyd *v.* Conshohocken Worsted Mills, 149 Pa., 363 (1892).

CHAPTER XIX.

POWERS OF CORPORATIONS.

401. General Powers Conferred by the Act of April 29, 1874.
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401. General Powers Conferred by the Act of April 29, 1874.

Corporations . . . . formed under the provisions of this act . . . . shall have the following powers, unless otherwise specially provided:—

First. To have succession by its corporate name for the period limited by its charter, and when no period is limited thereby, or

by this act, perpetually, subject to the power of the general assembly, under the Constitution of this Commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by law.

Fifth. To appoint and remove such subordinate officers and agents as the business of the corporation requires, and to allow them a suitable compensation.

Sixth. To make by-laws not inconsistent with law, for the management of its property, the regulation of its affairs and the transfer of its stock.

Seventh. To enter into any obligation necessary to the transaction of its ordinary affairs.[1]

As hereinbefore pointed out[2] these are practically the powers enumerated by Blackstone as inherently belonging to every corporation, and would belong to corporations, therefore, though not specifically conferred.

402. Construction of Grants of Power by the Act of April 29, 1874.

The incorporation of any association of persons for the purposes named in this act, or accepting the same, shall be held and taken to be of the same force and effect as if the powers and privileges conferred and the duties enjoined, had been conferred and enjoined by special act of the Legislature, and the franchises granted shall be construed according to the same rules of law and equity as if it had been created by special charter, and no modification or repeal of this act shall effect any franchise obtained under the provisions of the same.[3]

403. Powers of Corporations Formed Prior to the Adoption of the Constitution of 1874.

Charters of private corporations are left exactly as the new Con-

(1) Sec. 1, Act April 29, 1874, P. L., 73. This section was evidently taken from the Railroad Incorporation Act of April 4, 1868, P. L., 62. Other incorporation acts since the Act of 1874 confer practically the same powers.

(2) Sec. 42.

(3) Sec. 25, Act April 29, 1874, P. L., 83.

stitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation.[4]

404. Construction of Charters and Franchises.

Assuming an act of incorporation to be a contract between the State and the stockholders, the construction of such a contract is strict against the corporation and liberal in favor of the State. A corporation acquires no privilege, exemption or immunity under its charter except what is expressly and unequivocally given,[5] and whatever is not expressly and unequivocally granted is taken to have been withheld.[6] When a power is conferred, however, the means of carrying it into effect follow the grant of the power and do not require express mention.[7]

Thus the power to execute and issue bonds, contracts and other certificates of indebtedness belongs to all corporations, public or private, and is inseparable from their existence. The power to contract necessarily involves the cognate power to create debt, and a company authorized to raise money by mortgage may issue bonds to its creditors for work.[8]

And the power belongs to a corporation, as to an individual, unless restrained by its charter or by other statutes, to assign its property or effects to pay preferred creditors, without the authority or consent of the stockholders.[9]

A corporation, unless specially restricted by its charter or some statute, has general power to dispose of its property in whole or part, but it has no right to sell or assign its franchises, either in whole or in part, unless specially authorized by law.[10]

(4) Williamsport Pass. Ry. Co. *v.* Williamsport, 120 Pa., 1 (1888); Hays *v.* Com., 82 Pa., 518 (1876).

(5) Bank of Pa. *v.* Com., 19 Pa., 144 (1852); Pitts. & Connellsville R. R. Co. *v.* County of Allegheny, 63 Pa., 126 (1869); Com. *v.* Erie & N. E. R. R. Co., 27 Pa., 339 (1856); McMasters *v.* Reed's Executors, 1 Grant, 36 (1854).

(6) Packer *v.* Sunbury & Erie R. R. Co., 19 Pa., 218 (1852).

(7) Millvale Boro. *v.* Evergreen R. R. Co., 131 Pa., 1 (1889).

(8) Com. *v.* Councils of Pitts., 41 Pa., 278 (1861); Watts's Appeal, 78 Pa., 370 (1875); McMasters *v.* Reed's Executors, 1 Grant, 36 (1854).

(9) Dana *v.* Bank of the U. S., 5 W. & S., 253; Ahl *v.* Rhoads, 84 Pa., 319-24 (1877). But see Anderson *v.* Eltonhead, 26 W. N. C., 95 (1890).

(10) Pitts. & Connellsville R. R. Co. *v.* Bedford & Bridgeport R. R. Co., 81* Pa., 104 (1871). See Stewart & Foltz's Appeal, 56 Pa., 413 (1867).

The construction of charters is most strongly against the corporations or persons claiming rights under them, and most favorable to the public.[11]

Provisions in the articles of association of corporations formed under general laws which provisions are not authorized by the act under which the corporations are incorporated, respectively, may be treated as surplusage. If such unauthorized provisions are added, all acts done in pursuance thereto will be void, but until the corporation is proceeded against for an abuse of its franchises, its rights as a corporation will not be affected by such unauthorized powers.[12]

405. Franchises.[13]

A franchise in Pennsylvania is a privilege vested in certain persons by grant from the sovereign authority in the State, to exercise powers or to perform acts which, without such grant, they could not do or perform.[13*] Unless the right of perpetual succession be such, a private business corporation possesses no franchises whatever.[14]

A legislative grant of exclusive privileges to a corporation is to be construed most strictly, and every intendment not obviously in favor of the grant claimed must be construed against it.[15]

A grant to a corporation by an act of assembly which merely confers upon it a new right, or enlarges an old one, without any consideration, or the imposition of any new or additional burden thereupon, is a mere license and though accepted by the corporation may be repealed at any time.[16]

An act of incorporation authorizing a college to establish a department in "surgery (including dental surgery) and pharmacy,"

(11) Johnson *v.* Phila., 60 Pa., 445 (1869).

(12) Becket *v.* Uniontown B. & S. Assn., 88 Pa., 211 (1878); Albright et al. *v.* Lafayette B. & L. Assn., 102 Pa., 411 (1883).

(13) For Attacks on Special Franchises, see Sec. 46.

(13*) Twelfth St. Market Co. *v.* P. & R. Term. Co., 142 Pa., 580-90 (1891).

(14) East Side Bank *v.* Columbus Tanning Co., 170 Pa., 1-9 (1895).

(15) Emerson *v.* Com., 108 Pa., 111 (1884); Scranton Elec. L. & H. Co.'s Appeal, (Scranton Elec. Lt. & Ht. Co. *v.* Scranton Ill'g, Ht. & Pr. Co.) 122 Pa., 154 (1888).

(16) Penna. R. R. Co. *v.* Bowers, 124 Pa., 183 (1889); Johnson *v.* Crow, 87 Pa., 184 (1878); Christ Church *v.* Phila., 24 How., 300; Phila. & Gray's Ferry Pass. Ry. Co.'s Appeal, 102 Pa., 123 (1883).

and a supplementary act giving the college the same right as to conferring degrees in medicine as are possessed by the University of Pennsylvania, gives the college power to confer degrees in dental surgery and pharmacy.[17]

When matters in a proviso to the charter of a private corporation are made and intended to be essential conditions of the enjoyment of the charter, the privileges granted must be enjoyed subject to the conditions, or not enjoyed at all.[18] But where a clause in the charter of a private corporation granting a public franchise, relates merely to the manner in which such franchise shall be exercised, it will not be so construed as to defeat the purpose of the grant.[19]

The franchises of manufacturing corporations do not pass under a general assignment for the benefit of creditors, and a court has, therefore, no power to order the sale by the assignee of such franchises with the other property of the corporation.[20]

In the construction of statutes giving privileges to individuals, where there is ambiguity or inconsistency in the language of the grant, if one construction bears against the public trade and convenience, and another abridges the grant, that must be adopted which follows the public convenience and trade.[21]

406. Power to Have Succession by a Corporate Name.

A corporation has, as a general rule, no right to any other than its corporate name, and an injunction will not issue to restrain the use by another company of a name not the corporate name of the plaintiff, when there is no evidence of any special circumstances under which such name might have been acquired as a trade name.[22]

A corporation may not appropriate a purely geographical name as a part of its title so as to prevent another corporation operating

(17) In re Med.-Chi. College of Pa., 21 Pa. C. C., 157 (1898); 190 Pa., 121 (1899).

(18) West Branch Boom Co. *v.* Penn Joint L. & L. Co., 121 Pa., 143 (1888); Dugan *v.* Bridge Co., 27 Pa., 303 (1856).

(19) West Branch Boom Co. *v.* Penn Joint L. & L. Co., 121 Pa., 143 (1888); Whittaker *v.* Del. & H. Canal Co., 87 Pa., 34 (1878).

(20) Lehigh Iron Co.'s Assigned Estate, 12 Pa. C. C., 257 (1892).

(21) Stormfeltz *v.* Manor Tpk. Co., 13 Pa., 554 (1850).

(22) N. Y. Belting & Packing Co., Lim. *v.* Goodyear Rubber Hose & P. Co., 7 D. R., 76 (1897).

in the district to which the name applies from using the same name in its title.[22*]

A court of equity has jurisdiction to entertain a bill by a corporation to restrain by injunction another corporation from wrongfully using plaintiff's name. When such a bill has been dismissed by the lower court on demurrer, the Supreme Court, in reversing the decree, may enter a decree finally disposing of the whole matter.[23]

As a domestic corporation may not be incorporated in Pennsylvania with the same name as an older domestic company, so foreign corporations will not be privileged over domestic ones, and if such company take the name of a Pennsylvania corporation, it will be enjoined by a court of equity from the use of such name in Pennsylvania, although there may have been no fraudulent intent in taking such name, and though the foreign corporation may have duly registered in the office of the Secretary of the Commonwealth under the Act of April 22, 1874.[24]

The "Erie Printing Company" incorporated in good faith with that title has a standing in equity to enjoin an older corporation with the title of "Erie Lithographing and Printing Company" from using the name "Erie Printing Company," where it appears that the defendant did not use that name until after the incorporation of the plaintiff company, although its customers sometimes addressed letters to it in that name.[24*]

Certain parties being competitors in trade agreed to form a corporation, contracting among themselves to transfer thereto the exclusive use of their names so far as might be advisable. The names of two of the promoters were combined in the title of the corporation but only one name was adopted and used in connection with the corporation brand, no demand having been made for the transfer stipulated in the contract. Held, that a corporation subsequently promoted by two of the original owners might

(22*) Quemahoning Valley Coal Co., 28 Pa. C. C., 669 (1903); Laughman's Appeal, 128 Pa., 1 (1889).

(23) Fort Pitt B. & L. Assn. *v.* Model Plan B. & L. Assn., 159 Pa., 308 (1893).

(24) American Clay Mfg. Co., a corporation of Pa. *v.* Same, a corporation of N. J., 198 Pa., 189 (1901).

(24*) Erie Printing Co. *v.* Erie Lithographing & Printing Co., 31 Pa. C. C., 1 (1905).

use the other name, such name being that of the two promoters.[24**]

The proprietor of a business college in Philadelphia, which he called the "University of Philadelphia," was enjoined from using that name at the instance of the University of Pennsylvania.[25]

The object and design of a private corporation are not to be ascertained in its corporate title.[26]

Corporations reorganized under the Acts of 1861, 1878 and 1887 may bear the names of the original companies, or others.[27]

Under the provisions of the Act of April 6, 1903, P. L., 7, the Commissioner of Insurance may not exclude from operating in Pennsylvania a foreign fraternal beneficial association because its name is very similar to that of another association already authorized to do business within the State.[27*]

407. Misnomer of Corporations.

A departure from the strict style of a corporation will not avoid its contract, if it substantially appear that the particular corporation was intended; and a latent ambiguity may, under proper averments, be explained by parol evidence.[28]

A corporation electing to carry on a branch of its business under an assumed name is liable for the acts of its agents acting within the scope of their authority, who contract under such assumed name with relation to such branch of business, whenever the contract would have been valid if made in the true name of the corporation.[28*]

A misnomer of a corporation, in a public notice to subscribers for stock to pay instalments on the stock subscribed for, is im-

(24**) Tygert-Allen Fertilizer Co. *v.* J. E. Tygert Co., 21 Pa. C. C., 193 (1898).

(25) Com. *v.* Banks, 198 Pa., 397 (1901).

(26) Central Pa. Teleph. & Supply Co. *v.* Thompson, 112 Pa., 118 (1886).

(27) Princes Metallic Paint Co., Op. Atty. Gen., 5 Pa. C. C., 194 (1888).

(27*) Maccabees *v.* Martin, 32 Pa. C. C., 58 (1906), over-ruling Op. Atty. Gen. in Registration of Foreign Beneficial Societies, 12 D. R., 355 (1903).

(28) Berks & Dau. Tpk. Rd. Co., 6 S. & R., 12 (1820); Hendel, etc. *v.* Berks & Dau. Tpk. Rd. Co., 16 S. & R., 92 (1827); Ulysses Elgin Butter Co., Ld. *v.* Hartford Fire Ins. Co., 20 Pa. Super. Ct., 384 (1902).

(28*) Phillips *v.* International Text Books Co., 26 Pa. Super. Ct., 230 (1904).

material in an action by the corporation against the subscriber, upon his obligation to pay.[29]

The misnomer of a corporation plaintiff can be taken advantage of only by a plea in abatement.[30]

When a corporation was sued as "The Citizens' Bank," its corporate name being "The Citizens' Bank of Philadelphia," and it appeared that the deposit book given the plaintiff bore merely the first mentioned name, held, that the designation was sufficient;-[31] and the courts will sometimes permit the amendment of the names of corporations, parties in suits, as when the Union Car Spring Co., plaintiff, was permitted to amend to Union Car Spring Manufacturing Co.[32]

A summons issued against A. B., president of the Blank Company, does not make the corporation a defendant.[33]

408. Power to Make Assignments.

Corporations, unless expressly restrained by the act which establishes them or some other act of assembly, have always had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as an individual may do in respect to his own property. Hence an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter.[34]

409. Power to Sell Franchises and Property.

It shall be lawful for any corporation in the same manner [35] to sell, assign, dispose of and convey to any corporation created

(29) Gray *v.* Monongahela Nav. Co., 2 W. & S., 156 (1841).

(30) Rheem *v.* The Naughcheck Wheel Co., 33 Pa., 356 (1859); Northumberland County Bank *v.* Eyer, 60 Pa., 436 (1869); Freeland *v.* Penna. Central Ins. Co., 94 Pa., 504 (1880).

(31) Kroberger *v.* Citizens' Bank, 2 W. N. C., 80 (1875).

(32) Union Car Spring Co. *v.* Lebanon Mfg. Co., 2 Chest. Co. R., 331 (1884).

(33) Scranton Iron & Brass Co. *v.* Easterline, 1 Lack. Jur., 109 (1888).

(34) Dana *v.* Bank of the U. S., 5 W. & S., 223; Ardesco Oil Co. *v.* North American Oil & Mining Co., 66 Pa., 375 (1870); Burton's Appeal, 57 Pa., 213 (1868). See Chapter 24.

(35) That is, the corporation shall act upon the question of sale in the manner provided by Sections 18-22, of the Act of April 29, 1874, for the passing upon proposed increases of capital stock.

under or accepting the provisions of this act, its franchises, and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises, not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid.[36]

The entire property of a corporation may not be transferred to a new corporation, composed of members of the old company and some of its creditors, in such manner as to defeat the rights of other creditors of the old company,[37] but the transfer of property to another corporation, the president and owner of almost all the stock of which is also a director of the first company, is not fraudulent when it appears that such director took no part in voting for the transfer, and that the property transferred was not essential to the transaction of the business of the first corporation.[38]

Where individuals or corporations transfer their property to a new corporation, substantially owned and controlled by the transferers, the new corporation takes the property subject to the claims of the non-assenting creditors of the transferers. Hence, on the trial of an interpleader issue between two companies of which the plaintiff claims as transferee of the judgment debtor of the defendant, while it is proper to permit inquiry into the charter and ownership of the plaintiff company, it is not error to exclude such line of inquiry as to the corporation defendant.[38*]

The proper method of passing upon the question of the transfer of property or franchises of a corporation, is by a resolution of the board of directors that the proposition, setting forth the same in detail, be submitted to the stockholders either at a special meeting to be called for the purpose or at the ensuing general meeting thereof. Notice of the purpose should be given each stockholder in either event. At such meeting the stockholders pass upon the proposition and if the same is adopted authorize by resolution the president and secretary to execute the necessary conveyances, under the seal of the corporation.

(36) Section 5, Act April 17, 1876, P. L., 33, amending Sec. 23, of the Act of April 29, 1874, P. L., 83.

(37) Montgomery Web Co. *v.* Dienelt, 133 Pa., 585 (1890).

(38) Finch Mfg. Co. *v.* Sterling Co., 11 York, 109 (1897).

(38*) Penna. Knitting Mills Co. *v.* Bibb Mfg. Co., 12 Pa. Super. Ct., 346 (1900).

410. Fraudulent Assignment by One Corporation to Another.

Where transfer of property from one corporation to another is, in substance and effect, a transfer by the stockholders of the former to themselves, they retaining their interest in it through holdings of the stock in the latter corporation, without other consideration than their previous ownership of stock in the former, the stockholders are not so completely severed from the corporation behind which they hide as to require the law to ignore the fact that the difference between the two corporations is merely in their names.

A corporation assigned all its property except a small part, left to satisfy the claim of its landlord for rent, to another corporation, newly organized, composed of stockholders in the first company and certain creditors of the same. The consideration was one dollar and the assumption by the new company of certain specified debts of the old, which included all its debts save what was owing to one creditor, whose claim was in litigation and approaching trial at date of assignment. Knowledge of the arrangement was withheld from him but given to all the other creditors. Held, that the assignment was fraudulent in law as to the creditor not assenting thereto.[39]

411. Quasi Public Corporations May Not Execute Assignments When.

It shall not be lawful for any company incorporated by the laws of this Commonwealth and empowered to construct, make and manage any railroad, canal or other public internal improvement, while the debts and liabilities or any part thereof incurred by the said company to contractors, laborers and workmen employed in the construction or repair of said improvement remain unpaid, to execute a general or partial assignment, conveyance, mortgage or other transfer, of the real or personal estate of the said company, so as to defeat, postpone, endanger or delay their said creditors, without the written assent of the said creditors first had and obtained; and any such assignment, conveyance, mortgage or transfer, shall be deemed fraudulent, null and void, as against any such contractors, laborers and workmen, creditors, as aforesaid.[40]

(39) Montgomery Web Co. *v.* Dienelt et al., 133 Pa., 585 (1890); 25 W. N. C., 549.

(40) Resolution of January 21, 1843, P. L., 367.

412. Wages of Miners, Laborers, etc., to be First Paid From Assigned Estates.

In all assignments of property, whether real or personal, which shall hereafter be made by any person or persons or chartered company, to trustees or assignees, on account of inability, at the time of the assignment, to pay his or their debts, the wages of miners, mechanics and laborers employed by such person or persons or chartered company shall be first preferred and paid by such trustees or assignees, before any other creditor or creditors of the assignor: *Provided,* That any one claim thus preferred shall not exceed $100.[41]

413. Scire Facias Against Property Assigned Contrary to Above Provisions.

Whenever any incorporated company, subject to the provisions of the above resolution, [42] shall divest themselves of their real or personal estate, contrary to the provisions of the said resolution, it shall and may be lawful for any contractor, laborer or workman employed in the construction or repair of the improvements of said company, having obtained judgment against the said company, to issue a scire facias upon said judgment, with notice to any person, or to any incorporated company, claiming to hold or own said real or personal estate, to be served in the same manner as a summons upon the defendant, if it can be found in the county, and upon the person or persons, or incorporated company claiming to hold or own such real estate; and if the defendant cannot be found, then upon the return of one *nihil* and service as aforesaid, on the person or persons, or company, claiming to hold or own as aforesaid, the case to proceed as in other cases of scire facias on judgment against terre tenants.[43]

The provisions of the resolution of January 21, 1843, P. L., 367, extend only to debts or liabilities which were incurred and remained unpaid prior to the execution of "any such assignment, conveyance, mortgage or transfer" in question. Hence a contractor, all of whose work was done after the recording of a trust deed executed by a railroad company, may have no advantage of

(41) Act April 22, 1854, P. L., 480.
(42) The Resolution of January 21, 1843, P. L., 367, Sec. 411.
(43) Act April 4, 1862, P. L., 235.

said resolution, even though his work and materials made the corporate property and franchises available as a security.[44]

"The terms of that resolution only make void such a mortgage as against 'any such contractors, laborers and workmen, creditors as aforesaid,' and not absolutely void as to all persons. It was expressly decided by this court in Shamokin, etc. R. Co. *v.* Malone, 85 Pa., 25, that the object of the resolution was simply to give a priority of claim over the mortgage to contractors and others. Citing Fox *v.* Seal, 22 Wall., 424. It would follow from this that as between the parties to the mortgage, and as against all other persons [than those named in the resolution] the mortgage is valid." [45]

414. Power to Pension Employes.

From and after the passage of this act corporations organized for profit under the laws of the Commonwealth of Pennsylvania may, out of the earnings of said corporations, grant allowances or pensions to employés for faithful and long continued service who have, in such service, become old, infirm or disabled: *Provided*, That the provisions of this act shall not apply to any director or officer of any such company or corporation.[46]

415. Power to Prefer Creditors.[47]

Prior to the passage of the Act of June 4, 1901, P, L., 404, infra, it was well settled that the confession of a judgment to a *bona fide* creditor, even though it had the effect of giving him a preference over other creditors, was not a fraudulent disposition on an insolvent estate,[48] and the rule was the same as to corporations as to individuals.[49] It was held, that, before the appointment of a receiver, a corporation could prefer creditors the same as an individual, with the distinction that if the preferred creditor

(44) Appeal of W. W. Reed, 122 Pa., 565 (1888); McBroom's Appeal, 44 Pa., 92 (1862); Tyrone & Clearfield Ry. Co. *v.* Jones, 79 Pa., 60 (1875).

(45) Fidelity Title & Trust Co. *v.* Schenley Park & Highlands Ry. Co., 189 Pa., 363 (1899).

(46) Act May 11, 1893, P. L., 42.

(47) See Sec. 556.

(48) Siegel *v.* Chidsey, 28 Pa., 279 (1857); Uhler *v.* Maulfair, 23 Pa., 481 (1854).

(49) Neal's Appeal, 129 Pa., 64 (1889).

were an officer of the corporation, the burden was on him to show that the preference was in all respects fair and conscionable.[50]

The said Act of 1901 deprives corporations, with individuals and partnerships, of the power of preferring creditors, when such corporations are insolvent or in contemplation of insolvency. It has been held that, as respects adverse proceedings, the jurisdiction of the State courts under said act is suspended while the National Bankruptcy Act of July 1, 1898, is in force,[51] but the prohibition of preferring creditors is probably now in force.

416. Preferences of Creditors of Insolvent Corporations Forbidden.

If any person, persons, firm, limited partnership, joint-stock company or corporation, being insolvent or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against, or who is under any liability for, such insolvent, shall procure, suffer or permit any judgment to be entered, by confession or otherwise, or any execution to be levied, or any attachment or sequestration to be made of any part of his, their or its real or personal property, or shall make any payment, pledge, assignment, transfer, conveyance or incumbrance thereof, either absolutely or as collateral security for a debt then existing, whether due or not, such judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance shall inure to the benefit of all the creditors of such insolvent, if an assignment for the benefit of creditors be made or proceedings in insolvency be commenced within four months after such judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance shall have been entered, issued, commenced, made or recorded, and in the case of personal property, exclusive possession given.[52]

(50) Cowan et al. *v.* Penna. Plate Glass Co., 184 Pa., 1 (1898). See, generally, Moller et al. *v.* Keystone Fibre Co., 187 Pa., 553 (1898); Keystone Watch Case Co. *v.* Phila. Optical & Watch Co., 34 W. N. C., 216 (1894); Nat. Bank of the Repub. *v.* Oxford Co-op. Car Co., 2 Pa. C. C., 360 (1874); Hall *v.* West Chester Pub. Co., 180 Pa., 561 (1897).

(51) Boggs' Estate, 11 D. R., 188 (1902); 26 Pa. C. C., 284 (1902); Dolhenty's Case, 26 Pa. C. C., 34 (1902); McMullin's Case, 26 Pa. C. C., 157 (1902); Emeigh's Case, 26 Pa. C. C., 253 (1902). See Lobach *v.* Riegel, 26 Pa. C. C., 145 (1902); Zacharias *v.* Imperial Stain, Paint & Filler Co., 11 D. R., 171 (1902).

(52) Sec. 1, Act June 4, 1901, P. L., 404.

417. Collusion on the Part of Preferred Creditors.

If any person, persons, firm, limited partnership, joint-stock company or corporations, being insolvent or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against, or who is under any liability for, such insolvent, shall procure, suffer or permit any judgment to be entered, by confession or otherwise, or any execution to be levied, or any attachment or sequestration to be made of any part of his, their or its real or personal property, or shall make any payment, pledge, assignment, transfer, conveyance, or incumbrance thereof, either absolutely or as collateral security for a debt then existing or about to be created, and if the aforesaid be known to such creditor, who thereby collusively attempts to obtain for himself or others a preference over other creditors, such judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance shall inure to the benefit of all the creditors of such insolvent, if an assignment for the benefit of creditors be made or proceedings in insolvency be commenced within four months after such judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance shall have been entered, issued, commenced, made or recorded, and in the case of personal property exclusive possession given. A presumption of such knowledge and intention shall arise, by reason of the fact of such insolvency, if the consideration be grossly inadequate, or if such judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance shall not have been entered, issued, commenced, made or recorded, and, in the case of personal property, exclusive possession be not given at or about the time of the creation of the debt, or if the transaction shall have not have been made in the usual and ordinary course of the business of such insolvent. But nothing herein contained shall in any manner affect any judgment, payment, pledge, assignment, transfer, conveyance, or incumbrance taken in good faith, without such knowledge or intention, when a debt is created or about to be created, if entered, made or recorded, and in the case of personal property exclusive possession be given at or about that time.[53]

(53) Sec. 2, Act June 4, 1901, P. L., 404.

418. Power to Contract.

A corporation unless otherwise specially provided by statute, may enter into any simple contract the same as an individual may, within the sphere of its functions.[54] It may contract by parol,[55] and may transact, in addition to its main business, all such subordinate and connected matters as are, if not essential, at least very convenient to the prosecution of the former.[56] Thus, a corporation organized for the purpose of manufacturing and supplying illuminating and heating gas may not only supply the gas itself, but may also incidentally deal in such patented appliances and conveniences as will induce new customers to use gas, or old ones to use more,[57] and a company incorporated to develop minerals and promote the clearing and settlement of the country may erect and operate a saw mill and a hotel.[58]

National banks may receive bonds and other securities as special deposits, and will be liable for damages occasioned by the loss thereof through gross negligence.[59]

Corporations are bound by all contracts, whether express or implied, whether by bond, bill of exchange or negotiable note, entered into in the usual and necessary course of their legitimate business, except where there is a statutory prohibition.[60]

419. Irregularities in Contracts With Corporations.

Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, though such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party has a

(54) Hand *v.* Clearfield Consol. Coal Co., 143 Pa., 408 (1891); McCullough *v.* Hartford Insurance Co., 2 Pa. Super. Ct., 233 (1896).

(55) See Chapter 8, Books and Seal, Sec. 121.

(56) Hamilton *v.* Lycoming Mut. Ins. Co., 5 Pa., 339 (1847).

(57) Malone *v.* Lancaster Gas Light Co., 182 Pa., 309 (1897).

(58) Watts' Appeal, 78 Pa., 370 (1875).

(59) First Nat. Bank of Carlisle *v.* Graham, 85 Pa., 91 (1877). Affirmed: 100 U. S., 699.

(60) McMasters *v.* Reed's Executors, 1 Grant, 36 (1854).

right in such case to presume their existence and the corporation is estopped to deny them.[61]

420. Power to Employ and Discharge Servants.

A corporation, whether municipal, public or private, unless otherwise specially provided by statute, may enter into any simple contract, either in writing or by parol, the same as an individual may, and may employ or discharge servants of any class necessary for the prosecution of its business, in the same manner as may be done by a natural person, but it cannot discharge a servant without any dereliction on his own part when he has been engaged for a fixed period. The dereliction on the part of the servant, to warrant his dismissal, must be such as to prevent the proper discharge of his duties to his employers.[62]

Unless restrained by contract, a corporation or individual may suspend or discharge an employe at pleasure, with or without cause, and the fact that the employe's reputation is affected unfavorably by inferences drawn from the suspension or discharge, will not render the employer liable in damages.[63]

A railroad company is not responsible under the rule of respondeat ouster for a libel of an employe published by its general superintendent, without authority from the corporation.[64]

421. Power to Hold Stocks and Bonds of Other Corporations.

Sec. 12 of the Act of April 29, 1874, provided that "It shall not be lawful for any such corporation to use any of its funds in the purchase of any stock in any other corporation, or to hold the same, except as collateral security for a prior indebtedness, except as provided in Sec. 37 of this act." Sec. 37 related to building and loan associations. The Act of May 25, 1887, P. L., 273, amending Sec. 12 of the Act of 1874, re-enacted this provision in the same language. The further supplement to Sec. 12 of the Act of 1874, of June 26, 1895, P. L., 369, omitted this provision, and inserted in lieu thereof the following: "It shall and may be lawful for any company, organized under the provisions of this act,

(61) Little Saw Mill Valley Tpk. Co. *v.* Fed. St. & Pleasant Valley Pass. Ry. Co., 194 Pa., 144 (1899).

(62) Hand *v.* Clearfield Consolidated Coal Co., 143 Pa., 408 (1891); 29 W. N. C., 9.

(63) Henry *v.* Pitts. & L. E. R. Co., 139 Pa., 289 (1891).

(64) Henry *v.* Pitts. & L. E. R. Co., 139 Pa., 289 (1891).

either for the purpose of carrying on any manufacturing business or for supply of water (f)or manufacturing and supplying light, of [within] this Commonwealth or elsewhere, to subscribe for, take, purchase, hold and dispose of the bonds or stock in any company of the same character, incorporated under the provisions of this act, or its supplements, or guarantee the payment of said bonds and the interest thereon, or either principal or interest, or to enter into contracts for the use or lease of the corporate property, real, personal or mixed of such company, upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such property in accordance with such contract or lease." The said Act of June 26, 1895, was later, amended by Act of March 24, 1905, P. L., 56. See Sec. 235.

The Act of July 2, 1901, P. L., 603, permits any corporation for profit to hold the stock and bonds of any other corporation as freely as an individual might do so.

Hereafter any corporation, organized for profit, created by general or special laws, may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of said stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.[65]

It shall be lawful for any railroad or other transportation corporation, created by or existing under the laws of this Commonwealth, from time to time to acquire, own and hold, pledge, sell, or otherwise dispose of, the stock, bonds and other securities, or either and to guarantee the stock, bonds, and other securities or either, of any corporation of this Commonwealth or elsewhere, engaged in the business of transportation, either on land or water, or owning an actual majority of the stock entitled to vote of any corporation so engaged and also of any other warehouse, storage elevator or terminal company, whose business is incidental to the business of transportation in which the purchasing or guaranteeing corporation shall be authorized to engage.[66]

Corporations incorporated under the provisions of the act, en-

(65) Act July 2, 1901, P. L., 603.

(66) Act April 23, 1903, P. L., 281, amending Act April 4, 1901, P. L., 76.

titled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, Anno Domini one thousand eight hundred and seventy-four, for the purpose of mining for petroleum, may subscribe for, purchase, hold and dispose of stocks and bonds of any other corporation, incorporated under the said act for the same purpose, and may also subscribe for, purchase, hold and dispose of stocks and bonds of any corporation incorporated under the provisions of the act, entitled "An act to provide for the incorporation and regulation of natural gas companies," approved the twenty-ninth day of May, Anno Domini one thousand eight hundred and eighty-five. And may also subcribe for, purchase, hold and dispose of stocks and bonds in any corporations of other States incorporated for similar purposes: *Provided,* That the amount of such stock held by any corporation, together with the amount of its capital stock, shall not exceed, in the aggregate, the amount to which the capital of such corporations is limited by the thirty-ninth section of the act to which this is a supplement.[67]

A corporation which acquires a majority of the capital stock of another corporation does not acquire the property and franchises of the latter. A transfer of a majority of the capital stock is not a transfer of the property of the company.[67*]

422. Bonds and Stocks of Iron and Steel Manufacturing Companies May be Held.

It shall and may be lawful for any incorporated company of this Commonwealth, or elsewhere, to subscribe for and take shares of stock in any company incorporated for the purposes named in said section thirty-eight of the said "corporation act of one thousand eight hundred and seventy-four," or to purchase the bonds or stock of such company or guarantee the payment of said bonds and the interest thereon, or either principal or interest; and it shall and may be lawful for any manufacturing company of this Commonwealth incorporated for purposes named in said section thirty-eight of the said corporation act of one thousand eight hundred and seventy-four to subscribe for, purchase, hold and dispose of bonds or stocks in any incorporated company of this Commonwealth, or elsewhere, or to guarantee the pay-

(67) Act May 3, 1889, P. L., 76.

(67*) Com. *v.* Punxsutawney Water Co., 197 Pa., 569 (1901).

ment of such bonds and the interest thereon, or either principal or interest: *Provided,* That this act shall not be construed to permit any corporation named herein to hold a majority of the stock of any railroad company or other common carrier.[68]

The Act of June 14, 1901, P. L., 566, permits telephone companies to buy and own the capital stock of any other like corporation.[69]

Where a corporation, although prohibited by its charter, enters into a contract for the purchase of stock in another corporation, and the contract is executed by the delivery of the stock, it cannot set up as a defense to an action on a promissory note given for the price of the stock and held by a *bona fide* purchaser, that the contract was *ultra vires* in that the twelfth section of the Act of April 29, 1874, prohibited corporations formed under said act from buying the stock of other corporations.[70]

423. Investment of Surplus Funds of Corporations.

It shall and may be lawful for any and all companies incorporated or organized under the laws of this Commonwealth, including those authorized thereby to transport merchandise or other property, and also for the directors, managers or trustees thereof, with the approval of the stockholders, to invest the surplus or other funds or earnings of such companies in mortgages on improved real estate, in ground rents, in the loans of the United States, in the purchase from holders thereof [of] any of the shares of the capital stock of the respective company, and also in the public debt of the State of Pennsylvania, or of the city of Philadelphia, or in other good stocks or securities, and to sell and transfer the same, and to reinvest the proceeds of such sales in securities or stocks of like kind, and to prescribe, by resolution of the directors, or the by-laws of the company, or otherwise, the mode of making such investments, purchases and sales, with the approval of the stockholders, and the amount or amounts thereof to be purchased, and the price or prices to be paid or received therefor, and the reinvestment of the proceeds thereof, and to make such compensation as the said directors, managers or trustees may deem proper to any director, manager, trustee, treasurer

(68) Act of June 17, 1887, P. L., 411, Sec. 3.
(69) See Sec. 1641.
(70) Wright *v.* Antwerp Pipe Line Co., 101 Pa., 204 (1882).

or other agent or officer of such company, for the keeping, receiving, paying, investing or re-investing of any of the moneys belonging to the said company, or for any other services performed by him or them as agents of the company or otherwise; . . . .[71]

This act was intended to permit compensation to a director or treasurer for services rendered in the exercise of the new powers conferred by the act, but so much of the act as gives the directors authority to vote themselves salaries "for any services performed by him or them as agents of the company or otherwise," is unconstitutional and void, the title of the bill giving no notice of such an object.[72]

424. Power to Borrow Money and Execute Bonds and Mortgages.[73]

425. Power of a Corporation to Buy and Hold Its Own Stock.

A solvent corporation may purchase and hold its own stock, or take the same in pledge,[74] but an insolvent one may not.[75]

426. Power of Corporations to Loan Money.

As a general rule of law corporations may not loan money unless their business ordinarily involves loaning,[76] but it has been held in Pennsylvania that it is lawful for a brewing company to loan money to saloon keepers, who are its customers, for the purpose of assisting them to buy saloons or paying their license taxes.[77]

427. Ultra Vires.

Where a corporation has entered into a contract which has been fully executed on one part, and nothing remains for it to do

(71) Act March 31, 1868, P. L., 50.

(72) Bergdoll *v.* The Bergdoll Brewing Co. et al., 10 D. R., 173 (1902).

(73) See Chapter 17, Indebtedness of Corporations, Sec. 352.

(74) Eby *v.* Guest, 94 Pa., 160 (1880); Early & Lane's Appeal, 89 Pa., 411 (1879); Dock *v.* Schlichter Jute Cordage Co., 167 Pa., 370 (1895); Coleman *v.* Columbia Oil Co., 51 Pa., 74 (1865).

(75) Columbian Bank's Estate, 147 Pa., 422 (1892).

(76) Cook on Corpns., Sec. 690.

(77) Brophy *v.* American Brewing Co., 11 D. R., 333 (1902).

but pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*.[78]

When a plaintiff has made out his case without calling the illegal transaction to his aid, the defendant who has enjoyed its benefits cannot set up the defense of *ultra vires*.[79]

Where a corporation, though prohibited by its charter, enters into a contract for the purchase of stock in another corporation, and the contract is executed by the delivery of the stock, it cannot set up, as a defense to an action on a promissory note given for the price of the stock, and held by a *bona fide* purchaser, that the contract was *ultra vires*.[80]

When an act done by directors is in excess of their authority, yet has been done with the *bona fide* intent of benefiting the corporation which they represent, and a shareholder, knowing thereof, does not dissent within a reasonable time, his assent to the act will be presumed, and he will be estopped from gainsaying it.[81]

A corporation formed for the sole purpose of manufacturing cannot enforce an executory contract to sell and deliver to it goods which are not to be used in the process of manufacturing, but are to be sold again for profit by the corporation.[82]

While a contract of partnership between a corporation and an individual is *ultra vires* the corporation, yet, if the contract has been executed and the corporation has received the benefit of the contract, it will be required in equity to account to the other party for what is due him under the contract.[83]

A stockholder and director filed a bill in equity against his corporation to have certain agreements between himself and the corporation, and one between the corporation and another company,

(78) Presbyterian Board *v.* Gilbee, 212 Pa., 310 (1905); Oil Creek & A. R. R. R. Co. *v.* Pa. Transp. Co., 83 Pa., 160 (1876); Montgomery Nat. Bank *v.* McCleaster, 13 Pa. C. C., 392 (1893); Auffmordt *v.* Volgler, 18 Pa. C. C., 17 (1896); Inter-State Mut. Fire Ins. Co. *v.* Brownback & Co., Ld., 1 Pa. Super. Ct., 183 (1896); Sanderson *v.* Imperial Underwear Co., 15 D. R., 695 (1906); National Bldg. L. & P. Assn. of N. J. *v.* Nat. Bldg. L. & P. Assn. of Pa., 1 Lehigh Co. L. J., 314 (1905).

(79) Wright et al. *v.* Antwerp Pipe Line Co. et al., 101 Pa., 204 (1882).

(80) Wright et al. *v.* Pipe Line Co. et al., 101 Pa. 204 (1882).

(81) Manhattan Hardware Co. *v.* Phalen, 128 Pa., 110 (1889); Watts' Appeal, 78 Pa., 370 (1875).

(82) Bosshardt & Wilson Co. *v.* Crescent Oil Co., Lim., 171 Pa., 109 (1895). See Bradley, Miller & Co. *v.* Kennedy, 48 Pitts. L. J., 274 (1901).

(83) Boyd *v.* Amer. Carbon Black Co., 182 Pa., 206 (1897).

declared void, and also for an accounting in certain partnership transactions between him and the corporation. Held, that while the fact that plaintiff was a stockholder and director in the corporation conferred no authority on the corporation to defraud him in partnership transactions with itself, neither did that fact confer on him authority, in the issue raised by the bill, to assert his rights as a stockholder; that on such a bill contracts between the corporation and other parties, alleged to be injurious to the stockholders, could not be considered; and that as the remedy at law would have been cumbersome, inconvenient and inadequate, equity will entertain jurisdiction of the bill.[84]

A court of equity will not declare a railroad lease null and void as between the parties to it on the ground of *ultra vires*, after the lease has been executed and the lessor has enjoyed some benefits from it.[85]

Consent, express or implied, by a member of a corporation, does not invalidate such act or estop such member from denying it.[86]

A manufacturing company formed under the Act of April 29, 1874, engaged in the selling of store goods. Plaintiffs, who had sold them a bill of goods, sued the directors on the ground that, as to the store business, they were partners. Held, that both vendors and vendees were estopped from setting up that the transaction was *ultra vires* the corporation.[87]

It is *ultra vires* for a newspaper corporation to do an accident insurance business by publishing coupons securing indemnities in cases of accident.[88]

A special act authorized the commissioners of Allegheny county to subscribe for stock of a railroad company, giving the bonds of the county therefor, bearing interest at six per cent., which the company was authorized to receive. The commissioners subscribed for the stock upon condition that the company should pay six per cent. interest upon the stock so taken. Held, that such a contract was unauthorized by the act, and that the directors having acted *ultra vires*, the company could repudiate

(84) Boyd *v.* Amer. Carbon Black Co., 182 Pa., 206 (1897).

(85) Pitts., Johnstown, E. & E. R. Co. *v.* Altoona & Beech Creek R. Co., 196 Pa., 452 (1900).

(86) Grand Lodge etc. *v.* Stepp, 3 Penny., 45 (1883).

(87) Smucker *v.* Duncan et al., 10 Pa. C. C., 430 (1891).

(88) Com. *v.* Phila. Inquirer Co., 3 D. R., 742 (1892).

the contract, requiring the company to pay interest upon the stock.[89]

In an action to recover the price of asphalt blocks, sold by a national bank to a defendant who has used the blocks in carrying out his contracts and has secured full value therefor, the defendant will not be allowed to set up the defense that the sale was *ultra vires* the bank.[90]

An agreement between two railroad companies was held to be *ultra vires* where it provided that, in the event of the failure of one of the companies to carry out its part of the agreement, the other might enter and take possession of its railroad and retain and operate the same until the first named company should secure the second against any loss resulting from the default of said first named company.[91]

Where two incorporated insurance companies entered into a contract without legislative authority, for the purpose, in effect of merging one of the companies in the other, held, that the contract was *ultra vires,* and that the court would not interfere by injunction at the suit of one company to decree specific performance, and that the doctrine of estoppel on the ground that the contract had been fully executed by one of the parties to it, could not be invoked against a non-assenting member of a corporation whose rights were infringed by the contract.[92]

The primary object of the incorporation of a corporation is the public welfare, and the interest of the stockholders is but secondary. Hence a wilful frustration of that intention, as where a gas company bought the stock of an electric light company, and thus prevented good electric light service, is a fraud on the public, and the corporation perpetrating the same is entitled to no equitable consideration.[93]

Where a national bank obtained a judgment against a debtor, procured an execution thereon and bought in the personal property at sheriff's sale, and left the same in the hands of the defendant, under an agreement that he should sell it as the agent of the bank, and conduct the business as he had previously con-

(89) Pitts. & S. R. Co. *v.* Allegheny County, 79 Pa., 210 (1875).

(90) Montgomery Nat. Bank *v.* McCleaster, 5 Dau. Co. Rep., 169 (1902).

(91) Wilmington & Reading R. R. Co. *v.* Berks Co., R. Co., 6 W. N. C., 115 (1878).

(92) Home Friendly Society *v.* Tyler, 9 Pa. C. C., 617 (1891).

(93) Scranton Elec. L. & H. Co.'s Appeal, 122 Pa., 154 (1888).

ducted it, accounting for the same to the bank, on a salary, held, that such ownership was not void, but merely voidable, and could be questioned only by the government in a direct proceeding instituted for the purpose.[94]

A corporation permitted by its charter to mine may not organize another corporation for the purpose of mining, nor purchase stock of such a corporation.[95]

It is *ultra vires* a street railway company to contract for leasing advertising space in its cars.[96]

It is beyond the powers of a manufacturing corporation to acquire by lease from a railroad company the right to build and operate a railway on the streets of a borough, even where the borough consents to the exercise of such power,[97] and a railroad company has no power to assign its franchises to an individual to be personally exercised by him.[98]

It is *ultra vires* for the directors of a corporation to guarantee or secure, on the part of the corporation, the individual indebtedness of an officer thereof.[99]

428. Acts Held to be Intra Vires.

A bridge company may elevate its bridge, after its construction, to a sufficient height to protect it from ice and freshets.[100]

A bank may act as the transfer agent of another bank, in the absence of any charter or statutory prohibition.[1]

A construction company may sell the securities of the company for which it is constructing the works, and agree to pay interest upon advance payments made on account thereof.[2]

Incorporated social clubs may sell liquor to their members.[3]

Corporations authorized to invest their capital in notes and to

(94) Lippincott, Trustee *v.* Longbottom, 6 Pa. C. C., 503 (1888).
(95) McMillan *v.* Carson Hill Mining Co., 12 Phila., 404 (1878).
(96) Pitts. & Birmingham Traction Co. *v.* Seidel, 19 Pa. C. C., 463 (1896).
(97) Barker *v.* Hartman Steel Co., 129 Pa., 551 (1889).
(98) Stewart's Appeal, 56 Pa., 413 (1867).
(99) Culver *v.* Reno Real Estate Co., 91 Pa., 367 (1879).
(100) Com. *v.* Pittston Ferry Bridge Co., 148 Pa., 621 (1892).
(1) Bank of Kentucky *v.* Schuylkill Bank, 1 Parsons, 180 (1846).
(2) Hetfield *v.* Addicks, 154 Pa., 1 (1893).
(3) Klein *v.* Livingston Club, 177 Pa., 224 (1896).

buy securities and to hold the same in payment of debts due them, may discount notes.[4]

Where the treasurer and general manager of a corporation signs as such a contract for certain work in the construction of new buildings, some of which buildings are the property of a second corporation, of which he is also the treasurer and general manager, and he subsequently approves the work by a letter which he signs as treasurer and general manager of the second corporation, a mechanic's lien filed against the buildings of the second corporation is not invalid, because the first corporation may have exceeded its powers in signing the contract.[5]

Brewing companies may loan money to saloon keepers who are their customers, for the purpose of assisting them to buy saloons and pay license fees.[6]

(4) Bright *v.* Mountain City Banking Co., 3 Penny., 478 (1882).

(5) General Fire Extinguisher Co. *v.* Magee Carpet Works, 199 Pa., 647 (1901).

(6) Brophy *v.* Amer. Brewing Co., 11 D. R., 333 (1902).

CHAPTER XX.

REAL ESTATE [1]—LEASES.

429. Power to Hold Real Estate.
430. Statutes of Mortmain.
431. Amount of Real and Personal Estate that May be Held by Religious, Charitable or Beneficial Corporations.
432. Court May Increase the Amount of Property to be Held by Religious, Educational, Charitable, etc., Corporations.
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447. Holding of Real Estate by Foreign Corporations.
448. Power to Lease.
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453. Leases of Street Railway Companies.

429. Power to Hold Real Estate.

No corporation shall engage in any business other than that

(1) See Chapter 30 as to power of foreign corporations to hold real estate, and Chapter 21 as to Eminent Domain.

expressly authorized in its charter, nor shall it take or hold any real estate, except such as may be necessary and proper for its legitimate business.[2]

Every corporation created under the provisions of this act or accepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property, as is necessary for the purposes of its organization and business. . . . .[3]

Corporations formed under the provisions of this act . . . . shall have the following powers . . . . To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by-laws.[4]

All corporations aggregate have, at common law, an incidental right to alien or dispose of their lands or chattels, unless specially restrained by their charters, but a court of equity will interfere to prevent a disposition of corporation property for other than corporate purposes. But like all other powers vested in agents, they must be executed in good faith, and for the objects for which they were imparted. Where the charter of a church vested the corporation property in a board of trustees, annually elected by the pewholders, on whom the execution of the trust devolved, a transfer of such property, and the trusts incident thereto, to third persons, vesting in them and their appointees, in perpetuity, and divesting the corporation of its control, is such a radical change of charter as could only be made by the Legislature. Therefore a mere majority of the corporators could not by vote make such a change, when they have no authority to alter their charter.[5]

430. Statutes of Mortmain.

The judges appointed to report upon what English statutes were in force in Pennsylvania, reported as follows, as to statutes of mortmain:—

"There are several statutes called statutes of mortmain, of which the Statute de Religiosis was passed in the seventh year of Edward I., statute the second, another in the thirteenth year of Edward I., Chap. 32, another in the fifteenth year of Richard II., Chapter 5, and another in the twenty-

(2) Sec. 5, Article 16, Constitution of Pennsylvania.

(3) Sec. 4, Act April 17, 1876, P. L., 32, amending Sec. 17, Act of April 29, 1874.

(4) Sec. 1, Act April 29, 1874, P. L., 73.

(5) Langolf *v.* Seiberlitch et al., 2 Parsons, 64 (1851).

third year of Henry VIII., Chap. 10. These statutes are in part inapplicable to this country, and in part applicable and in force. They are so far in force that all conveyances, either by deed or will, of lands and tenements or hereditaments, made to a body corporate or for the use of a body corporate, are void unless sanctioned by charter or act of assembly."[6]

In later decisions it was held that estates in land, taken by corporations not authorized to receive the same were not void but voidable, and that such corporations took an estate against all others but defeasible at the will of the Commonwealth.[7] The Commonwealth alone can object to the want of capacity in a corporation to hold land which it was not authorized by its charter to purchase.[8]

All the general incorporation acts grant the power to hold and convey land, and the Act of April 26, 1855, P. L., 328, prohibiting foreign corporations from holding real estate in Pennsylvania,[9] by implication permits domestic corporations, generally, to hold and convey the same.

The said Act of April 26, 1855, P. L., 328, provides, Sec. 11, that no estate may be bequeathed to religious or charitable uses except the same be devised by will made at least one calendar month before the death of testator. Under said act it has been held that a college is a charity within its meaning, and that a bequest for founding a college, made in a will executed less than a month before the testator's death, is void.[10]

431. Amount of Real and Personal Estate That May be Held by Religious, Charitable or Beneficial Corporations.

Any literary, religious or beneficial society, congregation or corporation having capacity to take and hold real and personal estate within this Commonwealth, may acquire and hold the same to the extent in the aggregate of the clear yearly value of thirty thousand dollars ($30,000), and to no greater extent, without an

(6) Report of the Judges, 3 Binney, 595 (1808).

(7) Leazure *v.* Hillegas, 7 S. & R., 320 (1821); Goundie *v.* Northampton Water Co., 7 Pa., 233 (1847); Leasure *v.* Union Mut. Ins. Co., 8 W. N. C., 429 (1880); Amer. Slate Co. *v.* Phillipsburg B. & L. Sav. Bank, 8 W. N. C., 430 (1880).

(8) Goundie *v.* Northampton Water Co., 7 Pa., 233 (1847); Fox *v.* Union Academy, 6 W. & S., 353 (1843); Bone *v.* Del. & Hudson Canal Co., 18 W. N. C., 125 (1886).

(9) See infra, Chapter 30, Foreign Corporations.

(10) Miller *v.* Porter, 53 Pa., 292 (1866).

express legislative sanction. Such value shall be ascertained as provided by the act to which this is a supplement.[11]

. . . . And in ascertaining such value all vacant lots or lands shall be taken to be of the annual value at which such lots or lands could be let upon ground rent, or at the interest of the price at which they would sell for cash and without sacrifice; and if occupied and yielding rent or income, then as of the annual value of such rent or income, or of the valuation as vacant ground, in the manner aforesaid, whichsoever shall be of the greater amount; but no edifice used for worship, education or an hospital, or the unproductive ground contained within the curtilage of such building, shall be included in such valuation: *Provided,* that no *bona fide* purchaser, for a valuable consideration, shall take a defeasible title by reason of the grantors having held property in excess of the limit aforesaid: *And provided,* That any property now held as aforesaid, in excess of such value, shall not be hereby invalidated or prejudiced in title or otherwise.[12]

432. Court May Increase the Amount of Property to be Held by Religious, Educational, Charitable, etc., Corporations.

It shall be lawful for any corporation formed for a religious, educational, literary, scientific or charitable purpose to file its petition in the Court of Common Pleas of the county where the principal office or place of business of such corporation is located, setting forth that the amount of property, real and personal, which said corporation by law is authorized to hold, is insufficient to enable it to fully and properly accomplish the religious, educational, literary, scientific or charitable work or purpose for which it was formed, and thereupon it shall be the duty of the court to which said petition is presented to make inquiry into the truth of the matters alleged in the petition, and if, upon such inquiry, the court is satisfied of the truth of the matters so alleged, and that the prayer of the petition can be allowed without injury to the public welfare, then it shall be lawful for the court to enter a decree extending and defining the amount of property, real and personal, which such corporation shall be permitted to hold.[13]

(11) Act of April 22, 1889, P. L., 42, amending Sec. 8, of Act of April 26, 1855, P. L., 331.

(12) Unamended portion of Sec. 8, Act April 26, 1855, P. L., 331.

(13) Act June 6, 1893, P. L., 324.

433. Religious Corporations May Hold Real Estate Purchased Before Their Charters are Amended so as to Permit Them to Hold the Same.

When, under existing laws, any religious corporation shall apply to the Court of Common Pleas of the proper county for an amendment or alteration of their charter, so as to acquire and hold real estate, and after decree and amendments are recorded and shall become a part of the charter of the said corporation, then such real estate which was purchased by and conveyed unto said corporation before amendment of their charter shall inure and vest in said corporation, with the same force and effect as if originally empowered to hold and acquire real estate: *Provided,* That no inquisition shall have been taken against the real estate so held to escheat, previous to the amendment of such charter; *And provided further,* That such real estate shall not exceed the amount in value which religious corporations are allowed to hold by charter.[14]

434. Amount of Real Estate Which May be Held by Corporations of Class 1, Under the Act of April 29, 1874.

Each of the said corporations may hold real estate to an amount the clear yearly value or income whereof shall not exceed twenty thousand dollars.[15]

435. Informality in the Execution of Deeds, Mortgages or Leases.

In case of any duly authorized sale, letting or mortgaging by a corporation, the same shall not be invalidated by any informality in the execution or acknowledgment of any conveyance, mortgage or other instrument by any officer of such corporation for carrying the same into effect: *Provided,* That no defect in substance shall be deemed to be cured hereby.[16]

436. Title to Real Estate of Corporations Sold at Sheriff's Sale.

In all cases where the real estate of any corporation shall be sold at sheriff's sale for the payment of *bona fide* debts, the

(14) Act of April 11, 1879, P. L., 22.

(15) Sec. 2, Act April 29, 1874, P. L., 73. See Sec. 431. This provision has been re-enacted in all the various amendments to said section.

(16) Sec. 3, Act June 8, 1881, P. L., 70. The Act of April 22, 1863, Sec. 3, P. L., 548, cured defects in corporate deeds and instruments made prior to its passage, and the Act of April 17, 1869, P. L., 68, made the provisions of said Act of 1863, applicable to such defects occurring between the date of the passage of the Act of 1863 and that of the latter act.

purchasers shall receive titles discharged from any right of forfeiture to the Commonwealth by reason of misnomer, limitation or defect of power in the said corporation to purchase and hold said lands; and the purchase money shall be distributed according to priority among the lien creditors, as in other cases.[17]

437. Charitable, Religious, etc., Corporations May Purchase Real Estate Whereon They Have Mortgages, etc., at Execution Sales.

In all cases of hospitals, schools, charitable, literary and religious institutions of all kinds, prohibited by their respective charters or by law from holding real estate, or limited as to the amount thereof, the said prohibition or limitation shall not be taken to extend to purchases made by corporations such as aforesaid, at sheriffs', masters' or marshals' sales of real estate, on which the party purchasing may hold a mortgage, judgment or ground rent, when such purchases are made to protect their respective interests; and that deeds made to them respectively as such purchasers, by sheriffs, masters or marshals making the sales, shall convey to the said purchasers respectively a good and indefeasible title to any and all real estate so purchased, as if no prohibition or limitation as to the purchase of real estate existed in their respective charters or in the law: *Provided*, That all real estate bought by any corporations such as aforesaid under the provisions of this act, in excess of the quantity they are allowed by law or their respective charters to hold, shall be sold by said corporations either on ground rent or otherwise within ten years from the purchase so made as aforesaid.[18]

438. Time Allowed by Above Provision for Holding Such Real Estate Extended.

The provisions of the act entitled "An act to extend the time during which corporations may hold and convey the title to real estate heretofore bought under execution, or conveyed to them in satisfaction of debts and now remaining in their hands unsold," approved the twentieth day of April, Anno Domini one

(17) Sec. 2, Act April 30, 1844, P. L., 532.

(18) Act of May 13, 1879, P. L., 60. The time allowed by this act for holding real estate purchased at execution sales has been extended by the Acts of May 22, 1883, P. L., 41; May 26, 1887, P. L., 274; May 18, 1893, P. L., 88, and April 20, 1897, P. L., 28, which last named act is given above.

thousand eight hundred and ninety-seven, which provides "that the time during which all corporations are authorized by law and their charters to hold and convey real estate acquired by them under execution, or in satisfaction of debts, be and the same is hereby extended to all property heretofore bought and now held by such corporations for and during a further period of five years from and after the expiration of the time during which, as aforesaid, they are now so authorized to hold and convey the same," be and the same are hereby revived, continued and extended for a further period of five years from and after the time for which they are now authorized by law to hold the same.[19]

439. Grantees of Charitable, Religious, etc., Corporations to Take Indefeasible Estates.

Where any conveyances of real estate in this Commonwealth have heretofore been made by any church, religious, eleemosynary or charitable corporation, or corporations of another State, to any citizen of the United States, or to any corporation chartered under the laws of this Commonwealth and authorized to hold real estate, before any inquisition shall have been taken against the real estate so conveyed to escheat the same, such citizen or corporation grantee shall hold, and may convey such title and estate, indefeasible as to any right of escheat in this Commonwealth by reason of such real estate having been held by an alien or corporation not authorized to hold the same by the laws of this Commonwealth.[20]

440. Corporations May Take Real Estate for Religious or Charitable Purposes.

It shall and may be lawful for any corporation incorporated under the laws of this State, or of any other State of the United States, to take, have and hold real estate heretofore given or devised, or hereafter given or devised to such corporation to be used for any religious or charitable purposes: *Provided,* That nothing herein contained shall be taken to relieve such real estate from being taxed in like manner with other real estate within this Commonwealth: *And provided further,* That all real estate held under the provisions of this act shall be sold by such

(19) Act of April 15, 1903, P. L., 200.
(20) Act May 29, 1889, P. L., 395.

corporations within five years from the time the right of possession shall accrue to such corporation.[21]

441. Validation of Transfers of Real Estate Made Before Recording of Charters.

Where, heretofore, any act has been done, or transfer or conveyance of any property been made to or by any corporation created or intended to be created by virtue of the provisions of the act of assembly approved April twenty-ninth, one thousand eight hundred and seventy-four, or its supplements, in good faith, after the issuing of letters patent and before the actual record of the certificate, such acts, transfers and conveyances shall, after said certificate has been duly recorded as provided in the said act, be deemed and taken to be valid and effectual for all purposes: *Provided,* This act shall not affect any proceeding now pending.[22]

442. Validation of Conveyances of Manufacturing Companies the Charters of Which Have Expired.

No exercise of franchise, grant, bargain and sale, feoffment, deed of conveyance, release, assignment or other assurance of lands, tenements and hereditaments, contract or agreement whatsoever, made, executed and delivered prior to June first, one thousand eight hundred and ninety-five, by any corporation of this Commonwealth, or by the successor of any such manufacturing corporation, shall be deemed, held or adjudged invalid or defective or insufficient in law by reason of the expiration of the term of its charter; but all and every such exercise of franchises, grant, bargain and sale, feoffment, deed of conveyance, release, assignment or other assurance, contract or agreement so made, executed and delivered shall be as good, valid and effectual in law and fact as if the charter of such corporation, or of the successor of such corporation, had not expired, or had been renewed or extended: *Provided, however,* That such corporation or the successor thereof has accepted the provisions of the Constitution of this Commonwealth and of the act of assembly, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four: *And provided*

(21) Act of June 8, 1891, P. L., 211. See Chapter 21.
(22) Act of July 10, 1901, P. L., 651.

further, That not more than ten years has elapsed since the expiration of the term of such charter.[23]

443. Acknowledgment of Deeds by Corporations, by Attorney.

A corporation may acknowledge any deed, conveyance, mortgage or other instrument of writing by an attorney appointed by such corporation, and such appointment may be embodied in said deed, conveyance, mortgage or other instrument of writing in substantially the following form: The (name of corporation), doth hereby constitute and appoint (name of appointee) to be its attorney for it, and in its name and as and for its corporate act and deed to acknowledge this (name of instrument) before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.[24]

Such acknowledgment may be made before any person or officer now or hereafter to be authorized by the laws of this Commonwealth to take acknowledgments of deeds or other instruments of writing, whose certificate of such acknowledgment shall be in substantially the following form: I hereby certify that on this day of , in the year of our Lord and before me, the subscriber, (title of officer taking acknowledgment) personally appeared (name of attorney) the attorney named in the foregoing (name of instrument), and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said (name of instrument) to be the act of the said (corporation's name). Witness my hand and seal the day and year aforesaid.[25]

All acknowledgments or proofs of deeds, conveyances, mortgages or other instruments of writing made by corporations prior to the passage of this act, are hereby validated and confirmed.[26] All acts or parts of acts inconsistent herewith are hereby repealed.[27]

(23) Act of May 16, 1895, P. L., 84.
(24) Sec. 1, Act May 11, 1901, P. L., 171.
(25) Sec. 2, Act May 11, 1901, P. L., 172.
(26) Sec. 3, Act May 11, 1901, P. L., 172.
(27) Sec. 4, Act May 11, 1901, P. L., 172.

444. Property Held by Domestic Corporations, the Shareholders of Which Do Not Reside Within the State Not to Escheat.

No real or personal property, the title to which is or may be held by or in the name of any corporation of this State, authorized by its charter or general law to hold the same, shall be escheated to the Commonwealth, nor shall, in any judicial proceeding, any inference of any relation of trust or agency arise, by reason of the character or residence of the shareholders holding the whole or part of the capital stock of such corporation, nor because the beneficial ownership of said property in whole or in part, is or has been in any person or persons, corporation or corporations prohibited from holding the same.[28]

Said lands and property shall again become liable to escheat, as already provided by law, if said corporations shall continue to hold said lands and property exceeding five years after the passage of this act, and an information in the nature of quo warranto or other proper proceeding shall be filed or brought by this Commonwealth to escheat the same: *Provided,* That no railroad, canal or other transportation company of this State, nor any corporation, in whose name the title to other lands or property is held, shall plead or have the benefit of this act, unless it shall have previously filed with the Secretary of the Commonwealth a certificate in writing, signed by the president and secretary, and attested by the corporate seal of the company, stating that, at a regular or special meeting of said board of directors, a resolution in pursuance to the consent of the stockholders, was adopted, accepting all the provisions of the seventeenth article of the Constitution of the State, and that all the powers of and privileges and the limitations and restrictions mentioned therein shall be deemed and taken for all purposes to apply to said corporation. No such certificate shall be made by the officers, aforesaid, without the consent of the stockholders of the corporation, at a general or special meeting first had and obtained: *And provided*

(28) Sec. 1, Act June 2, 1887, P. L., 302. This act was passed when the State was proceeding to escheat certain lands held by a domestic corporation, the stock of which was held by the N. Y., L. E. & Western R. Co., a foreign corporation. It was ultimately held—Com. *v.* New York, Lake Erie & Western R. R. Co., 139 Pa., 457—that such ownership of stock did not constitute a device for the holding of real estate, contrary to the Act of 1855, and that the lands were not escheatable. The said Act of 1887 has, therefore, no present force.

further, That no railroad, canal or other transportation company shall plead or have the benefit of this act, unless it shall have previously filed, with the Secretary of the State, its acceptance of all the provisions of article seventeen of the Constitution of this State, in manner and form as provided by law.[29]

445. Sale of Real Estate of Dissolved Corporations.[30]

446. Copies of Minutes of Corporations to be Prima Facie Evidence in Cases of the Sale, Letting or Mortgaging of Real Estate by Such Corporations.[31]

447. Holding of Real Estate by Foreign Corporations.[32]

448. Power to Lease.

Corporations having, unless expressly limited by law or charter, an unlimited power of alienation over their respective properties, may lease the same, which is but a partial or temporary alienation. *Omne majus continet in se minus.*[33]

But they may not lease their franchises, nor, in the case of quasi public corporations, property essential to the exercise of their franchises, unless expressly authorized to do so by their charters or by statute.[34]

Corporate leases need not be under the seal of the corporation.[35]

449. Who May Execute Corporate Leases.

Ordinarily the directors of a corporation may authorize the execution of corporate leases, but a lease which surrenders the control of all the property of a company, divests the company of all its active functions and practically winds up its existence ex-

(29) Sec. 2, Act June 2, 1887, P. L., 302.

(30) See Chapter 29, Dissolution of Corporations.

(31) See Chapter 8, Books and Seal, Sec. 120.

(32) See Chapter 30, Foreign Corporations, Secs. 713-723.

(33) Ardesco Oil Co. *v.* North Amer. Oil & Mining Co., 66 Pa., 375 (1870).

(34) Pitts. & C. R. Co. *v.* Bedford & B. R. Co., 81* Pa., 104 (1871); Wood *v.* Bedford & B. R. Co., 8 Phila., 94 (1871); Van Steuben *v.* Central R. Co. of N. J., 178 Pa., 367 (1896); Phila. *v.* W. U. Tel. Co., 11 Phila., 327 (1876); Thomas *v.* West Jersey R. Co., 9 W. N. C., 65 (1880).

(35) Merc. Hall Library Co. *v.* Pitts. Library Assn., 173 Pa., 30 (1896).

cept for such formal continuance as may be necessary for the receipt and distribution among its stockholders of rentals under the lease, cannot be authorized by the directors, but only by the stockholders, inasmuch as such a lease is an accepted completion of the corporate purposes.[36]

A majority of the board of directors of a passenger railway company, though controlling a majority of the stock, have no power, without special authority in their charter, to execute a lease of the road and property, without first submitting the question to the stockholders, at a meeting called in accordance with the provisions of their charter.[37]

450. Notice of Meeting at Which Lease is Authorized.

A lease is not valid unless made at a time of which all the stockholders and directors had notice.[38]

451. Liability of Lessees.

A lessee corporation assumes all the obligations and liabilities imposed by law upon the lessor company.[39]

A lessee railroad company is not subject, in using the leased road, to the charges fixed by its own charter, but to the requirements in the charter of the lessor company.[40]

A lessor company which leases its property free and clear of all debts, dues, claims and liabilities incurred or owing by it, cannot require the lessee company to issue free passes for life to land owners who had given releases for right of way in consideration thereof.[41]

Lessee railroad companies are liable for damages for injuries resulting to passengers from the operation of the leased road.[42]

452. What Leases Are Equivalent to Assignments.

A lease by one corporation to another of all its property in con-

(36) Martin *v.* Continental Pass. Ry. Co., 37 Leg. Int., 132 (1880).

(37) Martin *v.* Continental Pass. Ry. Co., 37 Leg. Int., 132 (1880).

(38) Kersey Oil & Min. Co. *v.* Oil Creek & A. R. R. Co., 5 W. N. C., 144 (1877).

(39) Mullen *v.* Phila. Traction Co., 4 Pa. C. C., 164 (1887); Com. *v.* Penna. R. Co., 20 W. N. C., 448 (1888).

(40) Pa. R. Co. *v.* Sly, 65 Pa., 205 (1870).

(41) Penna. Co. *v.* Erie & Pitts. R. Co., 108 Pa., 621 (1885).

(42) Phila. & R. R. Co. *v.* Anderson, 94 Pa., 351 (1880).

sideration of the lessee company assuming and paying the debts of the lessor company amounts to an assignment for the benefit of creditors.[43]

453. Leases of Street Railway Companies.

The two acts approved May 15, 1895, P. L., 63-4, authorize street passenger railway and traction companies or motor power companies to lease or contract with other similar companies for the operation of their property.[44]

(43) Lucas *v.* Sunbury & Erie R. Co., 32 Pa., 458 (1859); Gratz *v.* Pa. R. Co., 41 Pa., 447 (1862); Phila. & Erie R. Co. *v.* Catawissa R. R., 53 Pa., 20 (1866).

(44) O'Neill *v.* Hestonville, Mantua & F. St. Ry. Co., 9 D. R., 2 (1899).

CHAPTER XXI.

EMINENT DOMAIN.

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454. History—Canals.

The first delegation by the Commonwealth of the right of emi-

nent domain for corporate purposes was in the case of canal companies. The method of condemnation of property was by a writ *ad quod damnum*, the proceedings under which were elaborate, and presumably followed the common law practice.[1] The acts incorporating canal companies did not set forth what estate the companies should take in the lands condemned by them, but it was held in one case that they took a perpetual easement,[2] and in another that they took a fee.[3] But when the charter of a canal company authorized it to "enter upon, take possession of and use all such lands, real estate and streams as may be necessary for the purposes aforesaid" and provided that commissioners should ascertain "such *damages* as they think any person will sustain . . . . by the opening of said canal," held, that the company took an easement only, and not a fee.[4] This case apparently overruled an earlier one in which it was said: "And as to the word 'damages' . . . . the money which is given as compensation to the owner is given as his damages; and this as well when the company acquire a right to the fee simple, as any less estate." [5]

Where an act provided that the president and managers of a canal company might purchase lands, etc., or in default of purchasing, the Court of Quarter Sessions should appoint persons to ascertain and report the damages resulting from the taking of the same, held, that where the second method was resorted to the company took an easement only and not a fee.[5*]

The State in taking lands for the Pennsylvania Canal, under the Acts of February 26, 1826, and April 9, 1827, took a fee, which it transferred to its assignees, the Pennsylvania Railroad Company.[6]

(1) See Act of September 29, 1791, 4 Bioren, Ed. 1803, 88.

(2) Schuylkill & Susquehanna Nav. Co. *v.* Deckert et al., 2 Watts. 343 (1834); Pittsburgh & Lake Erie R. R. Co. *v.* Bruce, 102 Pa., 23 (1882).

(3) Union Canal Co. *v.* Young, 1 Whart., 410 (1826). See Spear *v.* Allison, 20 Pa., 200 (1852).

(4) Pitts. & L. E. R. R. Co. *v.* Bruce, 102 Pa., 23 (1882).

(5) Union Canal Co. *v.* Young, 1 Whart, 410 (1826). "It is called 'damages' only in the sense of an unliquidated demand, but in its nature it is the price of a purchased privilege." McClinton *v.* Pitts., Ft. W. & Chic. Ry. Co., 66 Pa., 404 (1870); Gilmore *v.* Pgh. Va. & Ch. R. R. Co., 104 Pa., 275 (1883).

(5*) Sholl *v.* Stump, 24 Pa. Super. Ct., 48 (1903).

(6) Haldeman *v.* Penna. R. R. Co., 50 Pa., 437 (1865). (This case seems to overlook the fact that the land owner was paid only what the

455. Turnpike Companies.

The method of condemning private property for turnpike purposes was much more summary than that for taking lands for canal purposes. All lands granted by the colonial proprietors were sold on a basis of one hundred and six acres for the price of one hundred acres, the extra six acres being given in consideration of the right reserved to build public highways through such lands without compensation for right of way. The special acts incorporating turnpike companies gave such corporations the same powers in this regard which the Commonwealth derived from the colonial proprietors, and provided for compensation to the owner only when materials were taken from outside the right of way, or where buildings or other improvements were injured or destroyed by the construction of the road.[7]

The General Turnpike Act of January 26, 1849, contained no provision for granting damages to persons through whose lands pikes were constructed, but the supplement thereto of April 27, 1849, Sec. 1, did provide for the recovery of damages by such owners.[8] So does the Act of April 29, 1874.[8*]

It has been held that turnpikes have no estate in the soil—but a mere right of way,[9] but it has also been held that, on the dissolution of a turnpike company, the land does not revert to the original owners, but the road remains as a public highway.[10]

land taken was worth, less the value of the benefit attaching to the remainder of his lands, because of the canal running through them, so that when the canal was removed, and the lands theretofore occupied by it were retained by the company, there was a partial failure of consideration.) Com. *v.* McAllister et al., 2 Watts, 190; Craig *v.* Mayor, etc., of Allegheny, 53 Pa., 477 (1866); Robinson *v.* W.Pa. R. R. Co., 72 Pa., 316 (1872); Wyoming Coal & Transpn. Co. *v.* Price, 81 Pa., 156 (1876); North Branch Canal Co. *v.* Hireen, 44 Pa., 418 (1863); Williamsport *v.* Penna. R. R. Co., 8 Pa. C. C., 350 (1890).

(7) McClenachan *v.* Curwen, 3 Yeates, 362; 6 Binney, 509 (1802); Com. *v.* Fisher, 1 Pen. & Watts, 462 (1830). See Township of East Union *v.* Conrey, 100 Pa., 362 (1882); McManus's Appeal, 5 Pa. Super. Ct., 65 (1897).

(8) Plank Road Co. *v.* Thomas, 20 Pa., 91 (1852); Plank Road Co. *v.* Ramage, Ibid, 95; Plank Road Co. *v.* Rea, Ibid, 97; Brown et al. *v.* Powell, 25 Pa., 229 (1855).

(8*) McManus' Appeal, 5 Pa. Super. Ct., 65 (1897).

(9) Fisher *v.* Coyle, 3 Watts, 407 (1834); Mifflin *v.* Hsbg., P., Mt. J. & L. R. R. Co., 16 Pa., 182 (1851).

(10) Pitts., McK. & Y. R. R. Co. *v.* Com., 104 Pa., 583 (1883)

456. Railroad Companies.

The estate taken by railroad companies incorporated prior to the passage of the Railroad Act of 1849 in the property condemned by them varied according to the language of the acts incorporating such companies. In some cases such companies took an easement only.

"When, therefore, the Lackawanna and Bloomsburg Railroad Company, under its charter, and the promoters of the private railroad, under the Act of 1832, were authorized to take private property for the use of their roads, the rights they acquired were a right of way and facilities necessary to the efficient use of the right. . . . . The fee remained in the private owner." [11]

Many of the early special acts incorporating railroad companies provided that the companies formed thereunder should become seized of the same estate in the land which the owner held, and such companies, therefore, took fees.[12]

The estate taken by railroad companies in property taken by them under the right of eminent domain, since the passage of the Railroad Act of 1849, was long supposed to be nothing more than an easement.

"Unlike the laws under which the State constructed her public works, and by virtue of which she took a fee simple estate in the land, the Act of 1849 conveys only the right to survey and locate the route for a railroad, and to enter into and upon and occupy all land on which its railroad, depots, etc., may be located, with the proviso 'that before such company shall enter upon or take possession of any such lands or materials, they shall make ample compensation to the owner or owners thereof, and tender adequate security therefor.' . . . . The character of the interest of the corporation in the land so taken and used for railroad purposes is thus clearly set forth. . . . . It is an easement, merely, upon the land, or right of way or passage, with such an occupancy as is necessary to give this right its effect; that is, in constructing, repairing and using the works adapted for the purpose of passage. Lance's Appeal, 55 Pa., 16

(11) Lance's Appeal, 55 Pa., 16 (1867). See East Penna. R. R. Co. *v.* Schollenberger, 54 Pa., 144 (1867).

(12) Schuler *v.* Penn Township & Northern Liberties R. R. Co., 3 Whart., 555 (1838); Levering *v.* Phila., G. & N. R. R. Co., 8 Wl. & S., 459 (1844).

(1867); Spear *v.* Allison, 20 Pa., 204; Shamokin Valley R. R. Co. *v.* Livermore, 47 Pa., 468; Haldeman *v.* Penna. R. R. Co., 50 Pa., 436; Mayor of Allegheny *v.* Ohio & Pa. R. R. Co., 26 Pa., 360." [13]

It has been held more recently, however, that the estate taken in such case is not an easement, but rather a base or conditional fee.

"The vice of this argument consists in treating the plaintiff's right as a mere easement or right of way. It has the actual possession of the property, and that possession is exclusive at all times and for all purposes, except where a way crosses it. P. & R. R. R. Co. *v.* Hummel, 44 Pa., 375; Junction R. R. Co. *v.* Phila., 88 Pa., 424. The estate acquired by a railroad is often spoken of as an easement, but the term is used in a loose way to distinguish it from a fee. In the recent case of Pennsylvania & Schuylkill Valley Railroad Company *v.* Reading Paper Mills, 30 W. N. C., 148, it was said by our Brother Mitchell: 'Such title is sometimes called an easement, but it is a right to exclusive possession, to fence in, to build over, the whole surface, to raise and maintain any appropriate superstructure, including necessary foundations, and to deal with it, within the limit of railroad uses, as absolutely and uncontrolled as an owner in fee. There is no such easement at common law, and it may well be doubted if it is not a misnomer to extend to this newly invented interest in lands the name of easement, *perhaps appropriate enough to the railroad's ordinary right of way for its tracks.* It would seem to be rather, a fee in the surface, and so much beneath as may be necessary for support, though a base or conditional fee, terminable on the cesser of the use for railroad purposes. But, whatever it may be called, it is, in substance, an interest in land, special and exclusive in its nature, and which may be the subject of special injury . . . . and therefore within the rule which governs the application of equitable relief.' " [14]

The right which a railroad company acquires in land by condemnation proceedings, under the Act of February 19, 1849, P. L., 79, however, is a right which it enjoys for the purposes of its business only and is limited to railroad uses. Hence such a com-

(13) Western Pa. R. R. Co. *v.* Johnston, 59 Pa., 290 (1868).

(14) Pitts., Ft. Wayne & Chic. Ry. Co. *v.* Peet, 152 Pa., 488 (1893); Speese *v.* Schuylkill River East Side R. R. Co., 23 Pa. C. C., 17 (1899).

pany may not grant to a telephone company the right to erect poles and wires on its right of way, where the same are to be used by the telephone company for its own profit having but slight connection with the business of the railroad. In such case the owner of the land may proceed against the telephone company in trespass for an unlawful entry.[14*]

457. Consequential Damages.

Prior to the adoption of the Constitution of 1874, corporations taking property under the right of eminent domain could not be required to pay for consequential damages arising from the construction or operation of their works unless specially required to do so by their charters, and such charters were held to be constitutional though no provision was made therein for the payment of such damages.[15]

The General Railroad Act of February 19, 1849, authorized in express terms compensation for damages purely consequential,[16] and the Constitution of 1874 expressly provided[17] that "municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, *injured or destroyed* by the construction or enlargement of their works."[18] Art. 7, Sec. 4 of the Constitution as amended in 1838 provided only for compensation to the owners of property "taken."

When an Act of 1854, consolidating certain railroad companies, provided that the consolidated company should be subject to all

(14*) Pittock *v.* Central District & Printing Teleg. Co., 31 Pa. Super. Ct., 589 (1906).

(15) Reitenbaugh *v.* Chester Valley R. R. Co., 21. Pa., 100 (1853), and cases cited; Buckwalter *v.* Black Rock Bridge Co., 38 Pa., 281 (1861); Pottstown Gas Co. *v.* Murphy, 39 Pa., 257 (1861); Clarke v. Birmingham & Pitts. Bridge Co., 41 Pa., 147 (1861); Cleveland & Pitts. R. R. Co. *v.* Speer, 56 Pa., 325 (1867); N. Y. & Erie R. R. Co. *v.* Young, 33 Pa., 175 (1859); City of Reading *v.* Althouse, 93 Pa., 400 (1880); Monongahela Nav. Co. *v.* Coon, 6 Pa., 379 (1847); Lycoming Gas & Water Co. *v.* Moyer, 11 W. N. C., 443; 99 Pa., 615 (1882), and numerous other cases.

(16) Hoffer *v.* Penna. Canal Co., 87 Pa., 221 (1878).

(17) Section 8, Art. 16.

(18) City of Reading *v.* Althouse, 93 Pa., 400 (1880); Fredericks *v.* Penna. Canal Co., 148 Pa., 317 (1892); Pusey *v.* City of Allegheny, 98 Pa., 522 (1881); Phila. & Reading R. R. Co. *v.* Patent, 17 W. N. C., 198 (1886); 43 Leg. Int., 89; 5 Atl. Rep., 747.

the provisions of the Railroad Act of February 19, 1849, P. L., 79, the twentieth section of which provides that the Legislature reserves the power to resume, alter or amend any charter granted under said act, held, that the eighth section of the sixteenth article of the Constitution of 1874, providing for the payment for consequential damages, effected an alteration of the charter of such company so as to make it responsible for the payment of such damages.[18*]

"Under the proceedings of the common law, every public improvement was preceded, if necessary, by a writ of *ad quod damnum* to ascertain what damages, if any, subjects of the crown would sustain thereby; 1 Black. Com., 139; but Penn's Concessions of 1681, 3 Y., 372, had the effect of so relaxing that wholesome rule that compensation for private property taken for such public purposes as turnpikes, etc., was provided for, if at all, by the Legislature, as a matter of grace and not of right. Then followed the constitutional guarantee of the people themselves, substantially reordained in 1838, prohibiting their representatives from investing 'any corporate body or individual with the privilege of taking private property for public use without requiring such corporation or individual to make compensation to the owner or owners of said property; or give adequate security therefor, before such property shall be taken.' Const., 1838, Art. VII, Sec. 4. In the absence of special charter obligation or legislative provision more comprehensive and stringent than the section just quoted, corporations were not liable for anything short of an actual taking. In other words, without such taking they were never liable, under that section for what are termed consequential damages. Cases of extreme hardship arose in which private property, no portion of which was taken, was greatly damaged in consequence of the lawful exercise of corporate authority delegated for public purposes. . . . .

". . . . When the Constitution of 1838 was adopted, railroads were in their infancy; but they soon multiplied rapidly, and the Legislature in providing liberally for their needs, on the one hand, and for the protection of private property rights, to some extent, on the other, enacted laws by which a mode of compensation was provided not only for property taken, but also for injuries resulting to the residue of a property, part of which only

(18*) Northern Central Ry. Co. *v.* Holland, 20 W. N. C., 428 (1887).

was taken for railroad purposes. These, together with similar provisions in special cases, were a great advance on the constitutional guaranty of 1838, which, as we have seen, required compensation only for property actually taken; but they left unprovided for cases of direct and serious injury and damage to adjacent private property, no part of which was actually taken for public use; and when the people resolved to change their organic law, they determined to provide specially, not only for that omission, among others, but also to place the whole subject beyond the control of their representatives in the Legislature. . . ." [19]

458. What Consequential Damages May be Recovered For.

A railroad company constructed an elevated railroad upon property owned by it in fee, lying on one side of a street, and operated a steam railroad thereon. From the noise, smoke and dust caused by the engine and cars injuries resulted to the plaintiff's property on the other side of the street. Held, that except on proof of negligence, the lawful use by a railroad company of a lawful erection entirely upon its own property is not the subject of damages, even under Sec. 8, Art. 16 of the Constitution.[20]

"The remedy provided by said constitutional provision to secure just compensation by corporations for property 'injured or destroyed' has relation to injuries which, though properly called consequential, are yet to be understood as confined to such injuries to one's property as are actual, positive and visible, the natural and necessary results of the original construction or enlargement of the works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the Constitution, in advance." [21]

But where a railroad is laid down upon a public street, and though at grade is so constructed with reference to the property of an abutting property owner that, by its operation in a lawful manner, access to the property, if not actually cut off, is rendered dangerous, the company is liable for the consequential damages

(19) Penna. R. R. Co. *v.* Marchant, 119 Pa., 541 (1888). Dissenting op. of Sterrett, J. p. 564-5.

(20) Penna. R. R. Co. *v.* Lippincott, 116 Pa., 472 (1887); 19 W. N. C., 513; Penna. R. R. Co. *v.* Marchant, 119 Pa., 541 (1888); Dooner *v.* Pa. R. R. Co., 142 Pa., 36 (1891).

(21) Penna. R. R. Co. *v.* Marchant, 119 Pa., 541 (1888).

under Sec. 8, Art. 16, of the Constitution. "Where the question is, the obstruction of access to a property by the building of a railroad, it is impossible to separate the construction from the operation of the road. In R. R. Co. *v.* Marchant, 119 Pa., 541, and R. R. Co. *v.* Lippincott, 116 Pa., 472, there was no injury to the property by reason of the creation and construction of the road, and we held that the constitutional provision was not intended to apply to injuries which were the result merely of the operation of the road, as distinguished from its construction."[22]

So, where the drainage of property is interfered with and access to such property is rendered dangerous, the company inflicting such injuries will be liable for consequential damages.[23]

Corporations created before the adoption of the Constitution of 1874, and not made liable for consequential damages by their charters are, nevertheless, liable for consequential damages for injuries inflicted by them subsequent to the adoption of said Constitution.[24]

The right of action for consequential injuries to land from the construction of a railroad, where no part of the land itself is taken, accrues when the railroad is constructed and not when it is first located and the appropriation made.[25]

It seems that the rule that corporations are not liable for consequential damages resulting from the lawful and proper operations of their works, is confined to corporations having the right of eminent domain, for it has been held that a street railway company not having the right of eminent domain, is liable for a special injury to another's property by the lawful operation of such street railway company's works on its own lands.[26]

A party on appeal from award of viewers assessing damages against a water company for taking part of his land with the springs thereon, claimed that there were no other springs on the

(22) Pa. Schuylkill Valley R. R. Co. *v.* Walsh et al., 124 Pa., 544 (1889).

(23) Pa. Schuylkill Valley R. R. Co. *v.* Ziemer, 124 Pa., 560 (1889).

(24) Pa. R. R. Co. *v.* Miller, 132 U. S., 75 (1889). See Pa. R. R. Co. *v.* G. R. Duncan's Admr., 129 Pa., 181 (1889); Pa. R. R. Co. *v.* Duncan, 111 Pa., 352.

(25) Penna. Schuylkill V. R. R. Co. *v.* Ziemer, 124 Pa., 560 (1889).

(26) Rogers *v.* Phila. Traction Co., 182 Pa., 473 (1897), citing Pottstown Gas Co. *v.* Murphy, 39 Pa., 257, and Hauck *v.* Tide Water Pipe Line Co., 153 Pa., 366, and see Ganster *v.* Metropolitan Elec. Co., 214 Pa., 628 (1906), and cases cited by counsel for appellant. Ryan *v.* P. R. R. Co., 132 Pa., 304 (1890).

land remaining to him. Held, that the plaintiff was entitled to recover consequential as well as direct damages, compensation not only for the land actually taken but also for the injury, if any, resulting from the taking to the residue of his land.[27]

The charter of a boom company provided that if any person should suffer damage by the exercise of the powers granted, the Court of Common Pleas should cause the damages to be ascertained. Through the jamming of logs in the company's boom, water was forced on the plaintiff's land. Held, that this was damage resulting from the exercise of powers granted to the company. "Cases of merely consequential damages not provided for in the charter of incorporation are not precedents for this, for here the company is proceeded against according to its own charter." [28]

459. Taking of Franchises and the Property of Corporations Possessing the Right of Eminent Domain Under Said Right.

Corporate franchises may be taken like any other species of property by the Commonwealth by virtue of the right of eminent domain, upon making compensation, and any one to whom the Commonwealth has delegated the right of eminent domain has like powers.[29] One legislature may not contract with a corporation that its property shall not be taken by eminent domain (Sec. 3, Art. 16, Constitution of Pennsylvania) and where in a charter the Legislature reserves its right to purchase a bridge after a certain time for a certain sum, this does not imply a relinquishment of the right to take the same by the power of eminent domain.[29*]

There must, however, be a necessity for the taking of a franchise so absolute that without it the grant will be defeated, and such a necessity as arises from the very nature of things, over which the corporation has not control, and not a necessity created by the corporation desiring to take the franchise, itself, for its own convenience or for the sake of economy.[30]

(27) Finn *v.* Providence Gas & Water Co., 99 Pa., 631 (1882).

(28) Bald Eagle Boom Co. *v.* Sanderson, 81* Pa., 402 (1876).

(29) Southwest Penna. Pipe Lines *v.* Directors of the Poor, 1 Pa. C. C., 460 (1886); Phila. & Grey's Ferry P. Ry.'s Appeal, 102 Pa., 123 (1883); In re Towanda Bridge Co., 91 Pa., 216 (1879).

(29*) Lock Haven Bridge Co. *v.* Clinton County, 157 Pa., 379 (1893).

(30) Penna. R. R. Co.'s Appeal, 93 Pa., 150 (1880); Appeal of the Sharon Ry. Co., 122 Pa., 533 (1888); Pittsburgh Junction R. R. Co.'s Appeal, Id., 511; Scranton Gas & Water Co. *v.* Northern Coal & Iron Co., 192 Pa., 80 (1899); Perry Co. R. R. Ex. Co. *v.* Newport & Sherman's Valley R. R. Co., 150 Pa., 193 (1892).

"It has been settled since the cases of Kensington Plan, 2 R., 445, and Phila. & Trenton R. R. Co., 6 Whart., 25, that property devoted to public uses, including franchises, is subject to eminent domain, and may be taken for other public uses, but it is equally settled that it cannot be so taken without legislative authority, expressed in clear terms, or by necessary implication . . . . in the long line of decisions from Stormfeltz *v.* Manor Turnpike Co., 13 Pa., 555, down to Pittsburgh Junction Railroad Company's Appeal, 122 Pa., 511, the rule itself has never been questioned.

"The appellee derives its power from a charter under the General Incorporation Act of 1874. It is not claimed that its charter gives it any express authority to take the public road in question. Whether that act would authorize the issue of any charter granting an express power to take other public property or franchises, except incidentally, and to such extent only as would not destroy or substantially impair the existing public use is at least extremely doubtful." [31]

In a case later than those cited it was held that a corporation may appropriate the property of another company under the right of eminent domain, unless a public trust is imposed upon the property. In other words, the property of private corporations may be so taken; of public corporations not.[31*]

But the term "private corporations" must have been intended to include railroad companies, because in a still later case it was held that while a railroad company cannot appropriate for its road a part of the yard of another railroad company reasonably necessary for the corporate purposes of the latter, merely for the sake of convenience or economy, yet where it was found that the proposed construction of the plaintiff company's road across the defendant company's yard would cause comparatively little damage, easily compensated in damages, and was absolutely necessary to plaintiff, the latter's right to effect such crossing was recognized and enforced.[32]

In the case of a street or highway something more than necessity is required to authorize an appropriation. A public

(31) Groff's Appeal, 128 Pa., 621 (1889); Groff *v.* Bird-in-Hand Tpk. Co., 144 Pa., 150 (1891).

(31*) Twelfth St. Market Co. *v.* Phila. & Read. Terminal Co., 142 Pa., 580 (1891).

(32) Pittsburgh Junction R. R. Co. *v.* Allegheny Valley R. R. Co., 146 Pa., 297 (1891).

street is a public franchise and is not such property as a corporation may take for its own use under the general power of eminent domain. It is a franchise which cannot be violated except by express legislative consent.[33]

When the chief engineer of a railroad company has surveyed and staked out the centre line of a proposed railroad and returned a map thereof to the office of the company, but no action is taken by the board of directors adopting the location, such company has no standing to ask for an injunction restraining another railroad company from proceeding regularly to appropriate land for a road which conflicts with the route of the first road, even though the land in question may be owned by the plaintiff company.[33*]

And where land belonging to a bridge company, but not in actual use by it, is a necessity to a railroad company for the purposes of additional tracks, which necessity can be met in no other way, the railroad company may condemn said land, even where the bridge company intended to use a part of it upon which to erect a toll-house, but it appears that such toll-house may be erected upon steel bents between the tracks.[34]

There is no rule of law which authorizes one corporation to take the property of another corporation without making compensation therefor because the stock of the latter has no market value, or the property itself is unproductive.[35]

Where a water company has condemned land for the construction of a dam made necessary by an increase of population of the community supplied with water by it, a natural gas company, the pipes of which are laid on said land by agreement with the owner, is not entitled to an injunction enjoining the construction of the dam, where it appears that the pipes could be relocated at slight expense, either before or after the construction of the dam.[35*]

(33) South Western State Normal School, 26 Pa. Super. Ct., 99 (1904).

(33*) Williamsport & North Branch R. R. Co. *v.* Phila. & Erie R. R. Co., 141 Pa., 407 (1891).

(34) Youghiogheny Bridge Co. *v.* Pitts. & Connellsville Railroad Co., 201 Pa., 457 (1902).

(35) In re Kensington & Oxford Tpk. Co., 97 Pa., 260 (1881).

(35*) Independent Nat. Gas Co. *v.* Butler Water Co., 210 Pa., 177 (1904).

460. What Classes of Corporations Enjoy the Right of Eminent Domain.

The following classes of corporations are endowed with the right of eminent domain in Pennsylvania:—

Railroad Companies, under the provisions of Secs. 10 and 11 of the Act of February 19, 1849, P. L., 83; Act of April 9, 1856, Secs. 2 and 3, P. L., 288; Act of June 8, 1893, Sec. 1, P. L., 350.

Road or Turnpike Companies. Act April 29, 1874, P. L., 73, Sec. 30, Cl. 2, referring to Sec. 41.

Water Storage and Water Power and Logging Companies, Sec. 4, Act June 22, 1883, P. L., 156.

Gas and Water Companies. Act April 29, 1874, P. L., 73, Sec. 34, Cl. 4, referring to Sec. 41.

Telegraph (and, by construction of the courts, Telephone) Companies and, possibly, Electric Transmission Companies. Act of April 29, 1874, P. L., 73, Sec. 33, Cl. 2, referring to Sec. 41.

Bridge Companies. Act April 29, 1874, P. L., 73, Sec. 31, Cl. 1, referring to Sec. 41.

Pipe Line Companies. Act of June 2, 1883, Sec. 3, P. L., 61.

Natural Gas Companies. Act of May 29, 1885, Sec. 10, P. L., 29.

Foreign corporations engaged in the natural gas business and complying with the Act of April 22, 1874, P. L., 108, have the right of eminent domain under said section. In re Ohio Valley Gas Co., 6 D. R., 200 (1897).

Boulevard Companies. Act of June 26, 1895, P, L., 382, Sec. 1, Cl. 4, referring to Sec. 41 of the Act of April 29, 1874, P. L., 73.

Elevated and Underground Railways. Act of June 7, 1901, P. L., 527, Sec. 8.

Exposition Companies. Act June 14, 1887, P. L., 383, Sec. 4.

Incline Plane Companies. Cl. 3, Sec. 1, Act of May 1, 1876, P. L., 185, referring to Sec. 41, Act April 29, 1874.

Ship Canal Companies, Sec. 11, Act June 24, 1895, P. L., 226.

Tunnel and Underground Passageway Companies. Act of June 25, 1895, Sec. 2, Cl. 3, referring to Sec. 41, of the Act of April 29, 1874.

Wharf Companies. Sec. 7, Act of April 17, 1876, P. L., 34, amending Sec. 31, Act April 29, 1874, Cl. 1, referring to Sec. 41 of said Act of 1874.

Iron and Steel Companies. Cl. 4, Sec. 38, Act April 29, 1874.

Street Passenger Railway Companies. Act of June 1, 1907, P. L., 368.

All corporations organized for the purposes enumerated in paragraph 18, Sec. 2, Class 2, Act April 29, 1874, Sec. 34, Cl, 4, Act of April 29, 1874, as amended by Act of June 12, 1879, P. L., 177.

The provision in Sec. 41 of the Act of April 29, 1874, prescribing the manner in which the right of eminent domain shall be exercised follows, in the main, the requirements of the Act of February 19, 1849, P. L., 83, Secs. 10 and 11, except that the later act provides for an appeal, as required by Sec. 8, Art. 16 of the Constitution of 1874, and an appeal is provided for in the case of property taken under the Act of 1849 and other acts passed prior to the adoption of the Constitution, by the Act of June 13, 1874, P. L., 283. The provisions of Sec. 3, Act of June 2, 1883, P. L., 61, and of Sec. 10, Act of May 29, 1885, P. L., 29, are practically the same as those of Sec. 41 of the Act of April 29, 1874.

Prior to the adoption of the Constitution of 1874 it was held that the right of trial by jury had never been held to belong to the citizen himself in proceedings by the State under her powers of eminent domain. Pa. R. R. Co. *v.* Lutheran Congregation, 53 Pa., 445 (1866).

461. Method of Taking Property Under the Right of Eminent Domain.

In all cases in which, under the provisions of this act any corporation is permitted to take waters, streams, lands, property, materials or franchises for the public purposes thereof, and the said corporation cannot agree with the owner or owners of any such waters, streams, lands, materials or franchises, for the compensation proper for the damage done or likely to be done to or sustained by any such owner or owners of such waters, streams, land or materials, which such corporation may enter upon, use or take away, in pursuance of the authority herein given, or by reason of the absence or legal incapacity of any such owner or owners, no such compensation can be agreed upon, the Court of Common Pleas of the proper county, on application thereto, by petition, either by said corporation or by the owner or owners or any one in behalf of either, shall appoint five discreet and disinterested freeholders of the proper county, and appoint a time not less than ten nor more than twenty days there-

after, for said viewers to meet at or upon the premises where the damages are alleged to be sustained, or the property taken, of which time and place five days' notice shall be given by the petitioner to the said viewers and the other party; and the said viewers, or any three of them, having been first duly sworn or affirmed faithfully, justly and impartially to decide and true report to make concerning all matters and things to be submitted to them, and in relation to which they are authorized to inquire in pursuance of the provisions of this act, and having viewed the premises, they shall estimate and determine the quantity, quality and value of said lands, streams or property so taken or occupied, or to be taken or occupied, or the materials so used or taken away, as the case may be and having a due regard to and making just allowance for the advantages which may have resulted, or which may seem likely to result to the owner or owners of said streams, land or materials, in consequence of the making of the improvements or conducting the operations of such corporation or of the construction of works for which the property is to be taken; and after having made a fair and just comparison of said advantages and disadvantages, they shall estimate and determine whether any, and, if any, what amount of damages has been or may be sustained, and to whom payable, and make report thereof to the said court; and if any damages be awarded, and the report be confirmed by the said court, judgment shall be entered thereon; and if the amount thereof be not paid within thirty days after the entry of such judgment, execution may then issue thereon, as in other cases of debt, for the sum so awarded, and the costs and expenses incurred shall be defrayed by the said corporation; and each of the said viewers shall be entitled to one dollar and fifty cents per day for every day necessarily employed in the performance of the duties herein prescribed, to be paid by such corporation.

In all cases where the parties cannot agree upon the amount of damages claimed, or by reason of the absence or legal incapacity of such owner or owners no such agreement can be made, either for lands, streams, water, water rights, franchises or materials, the corporation shall tender a bond with at least two sufficient sureties to the party claiming or entitled to any damages, or to the attorney or agent of any person absent, or to be (the) guardian or committee of any one under legal incapacity, the condition of which shall be that the said corporation will pay, or cause to

be paid, such amount of damages as the party shall be entitled to receive after the same shall have been agreed upon by the parties, or assessed in the manner provided for by this act: *Provided,* That in case the party or parties claiming damages refuse or do not accept the bond as tendered, the said corporation shall then give the party a written notice of the time when the same will be presented for filing in court, and thereafter the said corporation may present said bond to the Court of Common Pleas of the county where the lands, streams, water or materials are, and if approved the bond shall be filed in said court for the benefit of those interested, and recovery may be had thereon for the amount of damages assessed, if the same be not paid or cannot be made by execution on the judgment in the issue formed to try the question.

The viewers provided for in this section may be appointed before or after the entry for constructing said work or taking materials therefor, and after the filing of the bond hereinbefore provided for; and upon the report of said viewers, or any four of them, being filed in said court, either party, within thirty days thereafter, may file his, her or their appeal from said report to said court. After such appeal either party may put the cause at issue in the form directed by said court, and the same shall then be tried by said court and a jury, and after final judgment, either party may have a writ of error thereto from the Supreme Court, in the manner prescribed in other cases; the said court shall have power to order what notices shall be given connected with any part of the proceedings, and may make all such orders connected with the same as may be deemed requisite. If any exceptions be filed with any appeal to the proceedings, they shall be speedily disposed of; and if allowed, a new view shall be ordered; and if disallowed, the appeal shall proceed as before provided.[36]

462. Lands Taken Under Right Must Be Reasonably Necessary for the Purposes of the Corporation Taking Them.[37]

But the question of necessity is first to be decided by the corporation, and when there is nothing unreasonable in the location and condemnation the courts will not interfere. A corporation will not be enjoined from condemning a route for its water pipes

(36) Sec. 41, Act April 29, 1874, P. L., 104.
(37) Jarden *v.* R. R. Co., 3 Whart., 502.

because another route could have been adopted alleged to be cheaper for the company and less injurious to the land owner.[38]

463. Appeals From Assessments of Damages.

In all cases of damages assessed against any municipal or other corporation, or individual or individuals, invested with the privilege of taking private property for public use, for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, whether such assessment shall have been made by viewers or otherwise than upon a trial in court, and an appeal is not provided for or regulated by existing laws, an appeal may be taken by either party to the Court of Common Pleas of the proper county, within thirty days from the ascertainment of the damages, or the filing of a report thereof in court, pursuant to any general or special act, and not afterwards.[39]

Any appeal taken pursuant to this act, shall be signed by the party or parties taking the same, or by his or their agent or attorney, and shall be accompanied by an affidavit of the party appellant, or his or their agent or attorney, that the same is not taken for the purpose of delay, but because the affiant firmly believes that injustice has been done.[40]

Any party entitled to an appeal under the eighth section of the sixteenth article of the Constitution, or who would be entitled to an appeal in any future case under this act under the same circumstances, shall have the right to take an appeal from any assessment of damages, or re-assessment or ascertainment thereof as aforesaid, made or filed on or after the first day of January of the present year, and before the passage of this act; but such appeal shall be taken within thirty days after the pas-

(38) Biddle *v.* Wayne Water Works Co., 190 Pa., 94 (1899).

(39) Sec. 1, Act June 13, 1874, P. L., 283. This act was passed to carry into effect Sec. 8, Art. 16, of the Constitution, which provides that the amount of damages shall on demand of either party be found by a jury in all cases of appeal. Prior to the adoption of the Constitution of 1874 damages were usually fixed by viewers, from whose finding there was no right of appeal. See General R. R. Act of February 19, 1849, Sec. 11, P. L., 84. The act applies to damages for property taken by railroad companies and other corporations formed under acts passed before 1874. The Act of April 29, 1874, and subsequent acts all expressly provide for appeals.

(40) Sec. 2, Act June 13, 1874, P. L., 283.

sage of this act, and in conformity with the second section thereof.[41]

464. Parties May Waive Condemnation Proceedings and Try Cause in Courts of Common Pleas.

In any and every action brought to ascertain or recover damages caused to any owner of lands by reason of the appropriation of a right of way or easement in the lands of such owner by any municipal or other corporation invested with and having the right of eminent domain as now authorized by the laws of Pennsylvania, where such owner of lands and such municipal or other corporation cannot agree upon the amount of damage done or properly payable to said owner for the appropriation of a right of way or easement in said lands, the parties may, by agreement with each other, waive the right to have such damages assessed as is now required by law, and such owner may thereupon file his statement and claim in the Court of Common Pleas of the proper county and rule the defendant to plead thereto within fifteen days from notice of such rule, duly served upon said corporation, and the said suit shall be proceeded with the same as if an award of viewers had been filed and an appeal had been taken therefrom.[42]

Either party to such action as is referred to in section one of this act shall have the right during the trial of such action, on motion to the judge presiding at such trial, to demand and have the jury which may be selected to try said cause visit and view the premises over or through which the right of way or easement mentioned in section one of this act may extend, before rendering a verdict in such case.[43]

The Act of May 21, 1895, P. L., 89, relative to waiving assessment of damages by viewers, applies only to such actions as are brought directly to recover damages without the intervention of viewers to assess the damages. When the case arises by appeal from an award of viewers neither party can demand as of right that the jury shall visit or view the premises.[44]

(41) Sec. 3, Act June 13, 1874, P. L., 283.
(42) Sec. 1, Act of May 21, 1895, P. L., 89.
(43) Sec. 2, Act of May 21, 1895, P. L., 89.
(44) Frazee *v.* Mfrs. Lt. & Ht. Co., 20 Pa. Super. Ct., 420 (1902).

465. Certain Property Exempted From the Exercise of the Right of Eminent Domain.

No corporation now incorporated under the laws of this State, or which shall hereafter be incorporated thereunder, shall exercise the right of eminent domain as against the land now occupied by any building which was used during the Colonial or Revolutionary period as a place of assembly by the Council of the Colony of Pennsylvania, or by the Supreme Executive Council of the Commonwealth of Pennsylvania, or by the Congress of the United States; or as against the land now occupied by any fort, redoubt, or blockhouse erected during said Colonial or Revolutionary period; or as against any building used as headquarters by the Commander-in-chief of the Continental Army; or as against the site of any such building, fort, redoubt, blockhouse or headquarters, which said building, fort, redoubt, blockhouse or headquarters, or site thereof, is now or shall hereafter be preserved for its historic memories and associations, and not for private profit: *Provided*, That the said Colonial and Revolutionary period, as applied to the buildings, forts, redoubts, blockhouses or headquarters, or the sites thereof, as aforesaid, shall be taken as ended on the third day of September, Anno Domini one thousand seven hundred and eighty-three.[45]

466. Method of Securing Posseseion of Lands Taken by Right of Eminent Domain.

When any municipality, corporation, or company, having the right to acquire lands, buildings or other property by virtue of the laws of eminent domain, has tendered a bond in sufficient sum to secure the owner or lessee for damages, and the same has been accepted, or, if the acceptance of said bond has been refused, and the same has been filed in and approved by the court, such municipality, corporation, or company shall have the right to immediate possession thereof. If the owner, lessee, or occupier shall refuse to remove his personal property therefrom, or give up possession thereof, the petitioner in the proceedings may serve written notice upon such owner, lessee, or his agent, or the occupier, to remove his personal property therefrom, and give up possession of said lands, buildings or other property, within sixty days from the date of the service of said notice.[46]

(45) Act May 10, 1907, P. L., 196.
(46) Sec. 1, Act June 7, 1907, P. L., 461.

467. Writ of Habere Facias to Issue.

If the owner, lessee, or occupier of said lands, buildings or other property shall refuse or neglect to remove his personal property therefrom and give possession thereof, upon proof of the service of the notice, specified in section one of this act, in the office of the prothonotary for the county in which said lands, buildings or other property is located, a writ of habere facias possessionem shall forthwith issue, directing the sheriff to give to the party entitled thereto full and peaceable possession as is provided for by existing laws.[47]

468. Measure of Damages.

The true measure of damages for the taking of land for the construction of a railroad is, the difference between the market value of the property unaffected by the obstruction and its market value afterwards.[48]

When a strip of land is taken to widen a railroad company's right of way, the measure of damages is the difference between the market value of the whole tract of land, with its buildings, before the appropriation, and the market value of what remains after the appropriation.[49]

In such case the value of the land is to be determined, not only by the use to which it is put at the time of condemnation, but by any use to which it was then adapted or to a prospective use which at the time gave it a value. It is present conditions and not future possibilities which are to be considered.[50]

Damages are as a rule to be ascertained as of the date of the filing and approval of the bond.[50*]

Market value, as a measure of damages for land taken or injured by a railroad company, cannot be ascertained by evidence of particular sales of other properties alleged to be situated similarly to the one in question; such evidence would produce collateral issues and is not admissible.[51]

The adaptation of the property in question to any particular use

(47) Sec. 2, Act June 7, 1907, P. L., 461.

(48) Pittsburgh, Bradford & Buffalo R. R. Co. *v.* McCloskey, 110 Pa., 436 (1885).

(49) Mouday Mfg. Co. *v.* Penna. R. R. Co., 215 Pa., 110 (1906).

(50) Schonhardt *v.* Penna. R. R. Co., 216 Pa., 224 (1907).

(50*) Schonhardt *v.* Penna. R. R. Co., 216 Pa., 224 (1907).

(51) Pittsburgh & Western R. R. Co. *v.* Patterson, 107 Pa., 461 (1884).

to which it has been or may be applied is a proper element to be considered by the jury in estimating its market value before and after the location of a railroad, but the jury cannot take into consideration any supposed loss to the plaintiff of profits in his business by reason of the appropriation of his property.[52] Nor does the good-will of a business attach to a freehold so as to be taken account of in assessing damages for taking under the right of eminent domain,[53] and there can be no recovery for an actual or supposed loss of profits in a business carried on upon the premises.[54]

In arriving at damages for locating a pipe line under the right of eminent domain, the extent to which the value of the tract is diminished as a whole is to be considered. Hence possible injury to a subjacent mine, through escape of gas, is to be considered.[55]

Where lands were taken upon which a house was situated it was held error to instruct the jury that the damage done to the house was what it was fairly worth to remove the house and put it in good order. The house was a part of the realty and could not be considered except in connection therewith.[56]

In allowing for the advantages derived by an owner of lands from the taking thereof for a public purpose, those general benefits in which all others participate equally with the owner are not to be considered.[57]

Compensation for the permanent injury arising from the appropriation of land under the right of eminent domain is to be assessed in the statutory proceeding, and evidence of the effect of such appropriation upon the market value of the property, a part of which has been taken, is inadmissible upon the trial of an action for the trespass.[58]

On the trial of an appeal from the award of damages by appraisers of land taken by a railroad company in the construction of its road, evidence of the price paid or amount received for land in the neighborhood in particular instances is inadmissible;

(52) Pittsburgh & Western R. R. Co. *v.* Patterson, 107 Pa., 461 (1884)
(53) In re Race St., 24 Pa. C. C., 433 (1900).
(54) Becker *v.* Phila. & Reading R. R. Co., 177 Pa., 252 (1896).
(55) Davis *v.* Jefferson Gas Co., 147 Pa., 130 (1892). And see Finn *v.* Providence Gas & Water Co., 99 Pa., 631 (1882).
(56) Finn *v.* Providence Gas & Water Co., 99 Pa., 631 (1882).
(57) Susanna Root's Case, 77 Pa., 276 (1875).
(58) Keil *v.* Chartiers Valley Gas Co., 131 Pa., 466 (1889).

the only proper test is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, its market value or the general selling price of land in the neighborhood.[59]

When the property of a corporation is taken, the corporation has the right to recover compensation for its franchise, when the same cannot be exercised without such property, as well as for the value of the tangible property taken.[60]

Where a telegraph company constructed its line upon a highway without paying damages for the additional servitude thus imposed upon the property of abutting property holders, or giving security for the payment of the same, and long after files a petition for the appointment of viewers to assess such damages, the damages are to be assessed as of the date of filing the petition, and not as of the date of original entry, and as belonging to the respective owners at the time the petition is filed, and not to the owners at the date of such entry. For the trespass to the time of filing petition the owners have their remedy at law.[61]

469. Damages Not Limited by the Amount of the Bond.

Damages in condemnation proceedings are not limited by the amount of the bond of the company seeking to condemn the land.[62]

470. Corporations Possessing the Right of Eminent Domain Cannot Obtain Title to Rights of Way by Adverse Possession.

A corporation possessing the right of eminent domain cannot obtain possession of property by adverse possession.

"A corporation possessing the right of eminent domain cannot set up adverse possession of property for the statutory period when the real owner of the land undertakes to assert his right in it. The reason that adverse possession cannot be set up in such a case is that the law presumes, when a railroad company takes land for its corporate purpose, it does so under its high right of eminent domain and not as a willful trespasser whose trespass may grow into a title. Its enjoyment of the easement so acquired is upon the condition that proper compensation to the land owner will be

(59) East Penna. R. R. Co. *v.* Hiester, 40 Pa., 53 (1861).
(60) Monongahela Nav. Co. *v.* U. S., 148 U. S., 312 (1893).
(61) Shevalier *v.* Postal Teleg. Co., *22* Pa. Super. Ct., 506 (1903).
(62) Shevalier *v.* Postal Teleg. Co., *22* Pa. Super. Ct., 506 (1903)

made whenever demanded. The law regards such occupancy of the land as by its permission on the conditions stated, and not as the act of a mere trespasser to whom statutes of limitation may give rights." [63]

"What is true of a railroad company possessing the right of eminent domain is equally true of a turnpike company enjoying the same right." [64]

Where, however, a corporation possessing the right of eminent domain, takes land, not in the exercise of such right, but as a purchaser for its purposes, from one holding adverse possession, its title to a fee in the land will vest when the combined adverse possession of its vendor and its self exceeds twenty-one years.[65]

471. Statute of Limitations Does Not Run Against Claims for Damages.

The general statutory proceeding to assess damages for property taken, injured or destroyed in the exercise of the right of eminent domain, is not within the purview of the general statute of limitations of March 27, 1713, and this is so though bond has been given and approved and the corporation has lawfully taken possession more than six years prior to instituting proceedings.[66]

The Act of April 17, 1866, P. L., 106, limiting the time within which suit for right of way, etc., might be brought against railroad companies, was abrogated by Sec. 21, Art. 3, of the Constitution.[67]

The statute of limitations does, however, run against claims for trespass arising from the taking of property under the right of eminent domain. It was held in one case that the statute began to run not later than the time when the work commenced had

(63) Covert *v.* Pittsburgh & Western Railway Co., 204 Pa., 341 (1903); Carter *v.* Ridge Turnpike Co., 208 Pa., 565 (1904), reversing to this extent Carter *v.* Ridge Turnpike Co., 22 Pa. Sup. Ct., 163 (1903); Connellsville Gas Coal Co. *v.* B. & O. R. R. Co., 216 Pa., 309 (1907).

(64) Carter *v.* Ridge Turnpike Co., 208 Pa., 565 (1904).

(65) Covert *v.* Pittsburgh & Western Railway Co., 204 Pa., 341 (1903), reversing: Same Title, 18 Pa. Sup. Ct., 541, (1901).

(66) Keller *v.* Harrisburg & Potomac R. R. Co., 151 Pa., 67 (1892); Same Parties, 161 Pa., 504 (1894); Hannum *v.* Borough of West Chester, 63 Pa., 475 (1870); Del., Lack. & W. R. Co. *v.* Burson, 61 Pa., 369 (1869); McClinton *v.* Pitts., Ft. W. & Chic. Ry. Co., 66 Pa., 404 (1870).

(67) Keller *v.* Harrisburg & Potomac R. R. Co., 151 Pa., 67 (1892).

progressed to such an extent as to obstruct ingress and egress from the property to the street.[68]

472. Who is Entitled to the Payment of Damages.

The owner of the land at the time it is taken is the party entitled to damages, subject to the rights of lien creditors.[69]

The right to the payment of damages seems to be a personal claim of the owner of the property taken, at the time when the injury occurred, which does not run with the land nor pass by deed, although not reserved.[70]

Where the entry is not tortuous, or where, under a tortuous entry, the occupancy has become lawful by agreement of the parties or otherwise, before conveyance by the landowner, the damages belong to him and do not pass to his grantee, and should be assessed as of the date of the original entry, adding interest. But where the entry and occupation are unlawful, and no steps have been taken to fix the damages for permanent occupancy, the grantee of the owner at the time of entry is entitled to damages from the inception of his title.[71]

A tenant is an owner or party interested, within the statutes, entitled to security before an entry under the right of eminent domain can be lawfully made on his leasehold without his assent. For injury to his estate by reason of such unlawful entry he may recover in trespass, and the subsequent giving of security by the company will not deprive him of this remedy.[72]

473. Bond for Payment of Damages.

A foreign surety company will not be accepted as surety for a railroad company on a bond for payment of damages for the con-

(68) Cass, Trustee *v.* Penna. Co., 159 Pa., 273 (1893).

(69) Keller's Appeal, 2 Walker, 32 (1881); Brenner's Appeal, Ibid, 92 (1883); Lawrence's Appeal, 78 Pa., 365; Beale *v.* Pa. R. R. Co., 86 Pa., 509; Davis *v.* Titusville & Oil City Railway Co., 114 Pa., 308; McFadden *v.* Johnson, 72 Pa., 335; Ten Brooke *v.* Jahke, 77 Pa., 392; Warrell's Appeal, 25 W. N. C., 196.

(70) McFadden *v.* Johnson, 72 Pa., 335 (1872). But see Richards et ux. *v.* Buffalo, N. Y. & Phila. R. R. Co., 137 Pa., 524 (1890) apparently contra.

(71) Calkin *v.* Postal Teleg. Co., 11 D. R., 305 (1902).

(72) Pa. R. R. Co. *v.* Eby, 107 Pa., 166 (1884).

demnation of land unless it is specifically authorized by its charter to become surety in such cases.[73]

Where a bond has been given by a corporation taking lands under the right of eminent domain, and the company has entered and constructed its works upon said lands, the court has no power to compel the company to give additional security, where it is afterwards discovered that the sureties in the original bond are insolvent, and the assessment of damages exceeds the amount of bond. Otherwise, if the land owner had no notice of the presentation of the bond; but the decree approving the bond raises a presumption of notice.[74]

After a bond of a railroad company to secure a land owner compensation for land taken had been approved and ordered filed, under the provisions of Sec. 2 of the Act of April 9, 1856, P. L., 288, the land owner cannot sustain a bill in equity to restrain the completion of the railroad, on the ground that both the company and its sureties on the bond have become insolvent.[75]

Where a railroad company, unable to agree with the owner of property, gave a bond and took possession and subsequently the railroad and property were sold, under foreclosure upon a mortgage, held, that the purchaser took a clear title and that the owner of the land was thrown back upon the bond for said damage.[76]

A natural gas company incorporated under the Act of May 29, 1885, P. L., 29, and another company as surety, without an order of court, gave a bond for permission to enter on lands to lay a gas line. The bond was executed in the names of the companies, one by the general manager, the other by the president, without corporate, but with scroll, seals. The condition was that the obligors should pay "all damages of whatsoever nature and kind that may be suffered or sustained" by the obligee from the con-

(73) Altoona & Beech Creek Terminal R. R. Co.'s Bond, 24 Pa. C. C., 561 (1901); Phila., Harrisburg & Pgh. R. R. Co.'s Bond, 31 Pa. C. C., 340 (1905). See Emery *v.* Pa., Monongahela & Southern Ry. Co., 31 Pa. C. C., 636 (1905).

(74) Welsh *v.* New Castle & Northern R. R. Co., 6 Pa. C. C., 56 (1889); Bryant *v.* the Same, 6 Pa. C. C., 53 (1889).

(75) Wallace *v.* New Castle Northern Railway Co., 138 Pa., 168 (1890).

(76) Fries *v.* Southern Penna. R. R. & M. Co., 85 Pa., 73 (1877); Hoffman's Appeal, 118 Pa., 512 (1888); Caldwell Oil Co. *v.* W. N. Y. & P. R. R. Co., 15 D. R., 397 (1906). What if the bond were for a less amount than the amount of damages awarded? See Michael *v.* Crescent Pipe Line Co., 159 Pa., 99 (1893).

struction and repairs of the line, payable forthwith on the completion of the construction and repairs. Held, that by giving the bond the constructing company recognized the obligee's title, and his right to damages, and might proceed directly upon the bond without a previous assessment by viewers. An objection to the bond for defective execution, made after it had been admitted in evidence and after the plaintiff had closed his case came too late, the only remedy then being, a motion to strike the offer from the record. Under the provisions of the bond the plaintiff was entitled to recover damages not only for injuries directly occasioned but for consequential damages in a loss of local trade resulting from the enforced removal of his business.[77]

474. Unauthorized Entry.

"It has been settled in a series of cases from Harrisburg *v.* Crangle, 3 W. & S., 460, to McClinton *v.* Pittsburg, Ft. Wayne & Chicago R. R. Co., 66 Pa. 404, that it is trespass in a private corporation to take land for public use without first making compensation or giving adequate security therefor. The constitutional provision is express that it must be done 'before such property shall be taken.' The Constitution of 1790, in the tenth section of the Bill of Rights, merely provided that property shall not be taken or applied to public use 'without just compensation being made.' Under this clause it was held 'that it was not necessary that the compensation should be actually ascertained and paid before appropriation, it being sufficient if an adequate remedy was provided as the means of obtaining it without unreasonable delay.' But the remedy is illusory in the case of a private corporation where it is without means or becomes insolvent, and hence the provision in the fourth section of the seventh article of the Constitution as amended in 1838, viz.: 'The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken.' The language is not, shall *tender,* but shall give adequate security. The word *tender* in the proviso to the tenth section of the General Railroad Law of 1849 is a departure from the words of the Constitution." [78]

(77) Penn. Nat. Gas Co. *v.* Cook, 123 Pa., 170 (1888); 23 W. N. C., 52.
(78) Dimmick et al. *v.* Brodhead, 75 Pa., 464 (1874).

When, therefore, a railroad company tendered a bond with sureties to a land-owner who refused it, and before approval of the bond the officers, contractors, etc., entered on his land, held that trespass lay against the parties entering, though the bond was afterwards approved.[79]

A corporation which enters upon property without right is liable to punitive damages, but where the jury are satisfied that the entry was made in good faith by the corporation in the belief that it had the right to do so, the jury should not impose such damages.[80]

An entry by a corporation invested with the right of eminent domain upon private land, without first making compensation to the owner or giving adequate security therefor, is a trespass. Until such compensation is made or security given the full title to the premises is in the private owner, and he may maintain ejectment for their recovery.[81] Such occupation is a continuing trespass for which ejectment, trespass or case would lie, unaffected by the bar of the statute of limitations, as far as the right is concerned. Nothing but adverse possession or use for twenty-one years would bar the right of action.[82]

Where a corporation invested with the right of eminent domain enters upon land without paying therefor or securing payment before entry, trespass will lie, and the right of action vested in the land owner is not divested by the subsequent tender and approval of security and the institution of proceedings to condemn the land.[83]

In such case the plaintiff is entitled to recover for whatever damages he has suffered down to the time of bringing suit, or until a bond is filed and approved by the court.[84]

Where an owner of land begins proceedings to have damages assessed for the taking of the same, which fail by reason of there having been no such taking as would entitle him to damages as-

(79) Dimmick et al. *v.* Brodhead, 75 Pa., 464 (1874).

(80) Penna. R. R. Co. *v.* Eby, 107 Pa., 166 (1884).

(81) Phila., Newtown & N. Y. R. R. Co. *v.* Cooper, 105 Pa., 239 (1884).

(82) Hannum *v.* Borough of West Chester, 63 Pa., 475 (1870).

(83) Keil *v.* Chartiers Valley Gas Co., 131 Pa., 466 (1890); Penna. R. R. Co. *v.* Eby, 107 Pa., 166 (1884).

(84) Bethlehem South Gas & Water Co. *v.* Yoder et al., 112 Pa., 136 (1886); Dimmick et al. *v.* Brodhead, 75 Pa., 464 (1874).

sessed in that way, he may proceed in trespass or ejectment. He is not concluded by an election of remedies.[85]

Where a railroad company bought the property and franchises of a canal company, held that it could not construct its tracks on the right of way acquired by the canal company, without making compensation to the owner of the land, who might recover in ejectment against the railroad company, if such track was laid without making or securing compensation.[86]

It seems, however, that where the owner takes no active steps to prevent the entry of a corporation upon his lands, without the making of compensation therefor or giving security for the same, the company cannot be deprived of the easement acquired, but the owner is entitled to a common law action to recover damages for the injury sustained. The measure of damages in such case is, the difference between the value of the land before the entry and the value afterwards.[87]

475. Sale of Property of Condemning Corporation During Condemnation Proceedings.

A railroad company, unable to agree with the owner of lands for a right of way, gave a bond and took possession. Subsequently the railroad and property were sold under foreclosure of a mortgage. Held, in proceedings by scire facias against purchasers to compel payment of land damages that the purchaser took a clear title, and that the land owner was thrown back upon the bond for his said damages.[88]

But where a railroad entered on lands without making compensation or giving bond, and a judgment for damages, which remained unsatisfied, was obtained, and the property of the railroad company was sold to satisfy a mortgage, held, that the judicial sale did not divest the plaintiff's interest in the land, which was an estate and not a lien.[89]

Pending an appeal by the owner of lands taken by a water company from the report of the viewers, the property and franchises of the water company were sold at sheriff's sale, under a mort-

(85) Reap *v.* Scranton, 7 Pa. Super. Ct., 32 (1898).
(86) Pittsburgh & L. E. R. R. Co. *v.* Bruce, 102 Pa., 23 (1882).
(87) Hankey *v.* Phila. Company, 5 Pa. Super. Ct., 148 (1897).
(88) Fries *v.* Southern Pa. R. R. & M. Co., 85 Pa., 73 (1877).
(89) Buffalo, N. Y. & Phila. R. R. Co. *v.* Harvey, 107 Pa., 319 (1884).

gage. Held, that the said owner's claim for damages was a continuing lien upon the corporate property and that he could assert said claim by continuing the proceedings already begun, as against the sheriff's vendee.[90]

476. Exercise of Eminent Domain Must be Pursuant to Corporate Action.

The taking of lands by right of eminent domain must be in pursuance of the corporate action of the company, through its directors, and not by virtue of the sole authority of the president.[91]

477. Limitation of the Exercise of the Right of Eminent Domain.

The provision in acts giving the right of eminent domain prohibiting the location of any railroad, etc., through any "dwelling house in the occupancy of the owner or owners without his, her or their consent," includes curtilage.[92]

478. Manufacturing Corporations.

A manufacturing corporation cannot acquire by a lease from a railroad company the right of eminent domain vested in the latter, so as to be enabled to construct and operate a railway upon the streets of a borough, even with the consent of the municipal authorities,[93] and a court of equity has jurisdiction, under the Act of June 19, 1871, P. L., 1360, at the suit of an abutting property owner to compel a manufacturing company to remove a railroad which it has constructed in a street on which the plaintiff's property abuts.[94]

An application for a charter for a railroad indicating termini at points on the premises of two manufacturing establishments in the same city and indicating a private rather than a public use will be refused.[95]

(90) Lycoming Gas & Water Co. *v.* Moyer, 99 Pa., 615 (1882).
(91) Schaadt *v.* Ironton R. R. Co, 22 Pa. C. C., 101 (1898).
(92) Swift & Given's Appeal, 111 Pa., 516 (1886).
(93) Barker et al. *v.* Hartman Steel Co., 129 Pa., 551 (1889).
(94) Hopkins *v.* Catasauqua Mfg. Co. et al., 180 Pa., 199 (1897).
(95) Pgh. Transfer R. R. Co., Op. Atty. Gen., 1 Pa. C. C., 411 (1886).

479. No Question of Contract Involved in the Exercise of the Right.

The State takes private property for public use in virtue of her right of eminent domain. There is no question of contract involved.[96]

Damages for taking of property by a railroad company arise under the power of eminent domain, and do not rest in contract, express or implied, and such company is not, therefore, entitled to a stay of execution under the provisions of the Act of June 16, 1836, Sec. 3.[97]

480. Taking of Coal Lands.

While a release from the owner of surface land, exempting the owners of underlying minerals and their estates from the obligation of surface support, will be binding upon all persons subsequently taking title from the releasors, the State or its grantee, entering upon the surface under the power of eminent domain, will not be bound or restricted thereby.[98]

Wherefore an owner of coal *in situ* to whom the surface owner had granted the right to remove the whole of it without liability for any resulting subsidence of the surface, is entitled to an injunction restraining a corporation from entering upon the overlying surface to construct a pipe line, until payment or security for compensation for the easement of support acquired by such an entry as a matter of law, or until such corporation has agreed to be bound by the release granted by the owner of the surface and to accept the risk of subsidence which such release involves, excluding from its appropriation the coal underlying its line.[99]

Though a release by a corporation of its right to damages for injury to its lines by the removal of the underlying coal may operate as an estoppel against a claim by the corporation for such damages, yet the release will be ineffective as against the coal owner's right to compensation for the risk of injuries to the mine in the operation of the pipe line.[100]

(96) Hampton *v.* Commonwealth, 19 Pa., 329 (1852).

(97) Harrisburg & Potomac R. R. Co. *v.* Peffer, 84 Pa., 295 (1877).

(98) Penn Coal Co. *v.* Versailles Gas Co., 131 Pa., 522 (1889); 2 Mona., 730 (1890); 47 Leg. Int., 202.

(99) Penn Coal Co. *v.* Versailles Gas Co., 131 Pa., 522 (1889).

(100) Davis *v.* Jefferson Gas Co., 147 Pa., 130 (1892).

As Sec. 5, Art. 17 of the Constitution prohibiting common carriers from engaging in mining, etc., or in any other business than that of common carriers and from holding lands not necessary to their business, affixes no penalty for its violation, lands held in violation thereof are not liable to escheat, though the franchises of the offending company may be forfeited therefor.[1]

481. Taking of Property by Water Companies.

Title to land entered on by a water company against the consent of the owner, under the act of incorporation, for the purpose of constructing a reservoir, does not pass to the company until compensation is made or adequate security given therefor. Where a land owner refused the bond tendered by the company and proceedings to assess damages were instituted, from the award in which the plaintiff appealed, no title to the land passed until, by agreement, judgment was entered for the amount of damages agreed upon, and the judgment, as for purchase money, was held entitled to be paid out of the proceeds of the lot.[3]

Where a water company has proceeded under the right of eminent domain, taken the land and filed its bond, which has been accepted by the parties claiming damages, the company cannot discontinue its proceedings. There has been a permanent taking and appropriation of the land and waters in question.[4]

A water company was incorporated in 1865 with power to take the waters of any stream "making compensation for the same." Its charter further provided that "if, in the location of . . . . the works, an injury should be done to private property, and the parties could not agree upon the amount of compensation," either party might apply to the court for the appointment of viewers. The company, in constructing its works used the waters of a certain stream, and diminished the flow of water to a mill race further down the stream. The owner of the mill race had purchased his water right from the owners of the land bordering on the stream where the mill race was built. Held, that the owner of said race had a property, of an incorporeal nature, in the waters of the stream, and that under the terms of the charter of the company

(1) Penn Coal Co. *v.* Versailles Gas Co., 131 Pa., 522 (1889).
(3) Appeal of the Borough of Easton et al., 47 Pa., 255 (1864).
(4) Weatherly Water Company's Petition, 21 Pa. C. C., 330 (1898).

he was entitled to recover compensation for the injury sustained by the diminution of the flow of water.[5]

On trial of an issue to determine damages a water company proposed to prove that after taking water so as to diminish the flow of water to a mill race further down the stream, a railroad company had built across the race in question, destroying the same, and a recovery had been had for injuries sustained by the construction of the railroad, to the full value of the mill and race. Held, that the evidence was properly excluded because the railroad company must be held to have made compensation having reference to the deterioration in value already caused by the water company, and because the railroad company took no water, but only caused an obstruction, so that the claim against it for damages was wholly unlike that against the water company.[6]

Where there has been an award of damages for the diversion of water, and subsequently the company diverting it diverts a greater quantity of water by permanently raising its dam, it is probable that this constitutes a new taking, which may be the subject of an assessment for damages.[7]

In a proceeding by a water company to condemn land the owner of the land may prove that he had, for more than twenty-one years, diverted from a stream on his land and sold to a railroad company, more water than he was entitled to as a riparian owner, and for purposes for which a riparian owner could not take and that there was no other stream from which certain neighboring municipalities and their inhabitants could be supplied.[8]

482. Taking of Personal Property.

"Recovery for taking personal property, unless it was materials used in construction, was not recognized or provided for by proceedings for condemnation, either before or after the Constitution of 1874. Of course for any trespass to personal property there was always a common law liability . . . ."[9]

483. Miscellaneous.

Where acts provide that before property shall be taken for pub-

(5) Lycoming Gas & Water Co. *v.* Moyer, 99 Pa., 615 (1882); 11 W. N. C., 443.

(6) Lycoming Gas & Water Co. *v.* Moyer, 99 Pa., 615 (1882).

(7) Union Canal Co. *v.* Stump & Fisher, 81* Pa., 355 (1876).

(8) Bryant *v.* Pottsville Water Co., 190 Pa., 366 (1899).

(9) Becker *v.* Phila. & Reading R. R. Co., 177 Pa., 252 (1896).

lic use by a corporation compensation shall be made to the owner, or adequate security shall be given, this cannot prevent either party, after an authorized taking, from prosecuting his petition under the acts, and ascertaining by the report of viewers the value of the land. The owner of the land in such a case may proceed separately in trespass.[10]

Former recoveries against a corporation endowed with the right of eminent domain, for constructing an inclined plane so as to be a continuing nuisance, do not estop an adjacent land owner from recovering damages which have accrued since such action.[11]

Where the Legislature provides a specific remedy for the recovery of damages for injuries sustained by the construction of a work of internal improvement by a corporation, a party injured cannot have recourse to a common law action.[12]

Lands held for the employment, maintenance and support of the poor may be entered upon by a corporation having the right of eminent domain, upon tender and approval of a proper bond.[13]

484. Vacation of Easements Acquired by Corporations on Lands.

In all cases where an easement on land has been acquired under proceedings in condemnation by any corporation possessing the right of eminent domain, and the same has been vacated and ceased to be used and occupied by any such corporation for a period of fifteen years or upwards, then and in that case said easement shall be held to have terminated and the original owner, his heirs and assigns, shall hold the title to the said land divested of said easement: *Provided,* That nothing in this act shall be held to apply to or affect any case where the fee simple title has been vested in the corporation ceasing to use or occupy said land, nor to affect, qualify, alter, or repeal the act of the general assembly of this Commonwealth, entitled "An act relating to

(10) Borough of Harrisburg *v.* Crangle, 3 W. & S., 460 (1842); Koch *v.* Williamsport Water Co., 65 Pa., 288 (1870).

(11) Hartman *v.* Pittsburgh Incline Plane Co., 11 Pa. Super. Ct., 438 (1899).

(12) McKinney *v.* Monon. Nav. Co., 14 Pa., 65 (1850); Cumb. Valley R. R. Co. *v.* McLanahan, 59 Pa., 23 (1868); Fehr *v.* Schuylkill Nav. Co., 69 Pa., 161 (1871).

(13) Southwest Penna. Pipe Lines *v.* Directors of the Poor, 1 Pa. C. C., 460 (1886).

straightened or improved lines of railroad," approved the third day of April, one thousand eight hundred and seventy-two.[14]

485. Proceedings Where the Possession of Lands or Tenements is Disputed or Denied.

When any person or persons, natural or artificial, shall be in possession of any lands or tenements in this Commonwealth, claiming to hold or own possession of the same by any right or title whatsoever, which right or title or right of possession shall be disputed or denied by any person or persons as aforesaid, it shall be lawful for any such person to apply by bill or petition to the Court of Common Pleas of the county where such land is situate, setting forth the facts of such claim of title and right of possession, and the denial thereof by the person or persons therein named, and thereupon the said court shall grant a rule upon such person or persons, so denying such right, title or right of possession, to appear at a time to be therein named, and to show cause why an issue shall not be framed in said court between the parties, to settle and determine their respective rights and title in and to said land. Twenty days' notice of such rule shall be given.

And, if upon the hearing of such rule, it shall appear to the court that the facts set forth in such petition are true, it shall be the duty of the court thereupon to frame an issue of such forms as the court shall deem proper between the respective parties to settle and determine the right and title of the respective parties to said land, and the verdict of the jury in such issue shall have the same force and effect upon the right and title and right of possession of the respective parties in and to said land as a verdict in ejectment upon an equitable title.

In case the person or persons denying such right, title or right of possession in such lands or any of them are not residents within the jurisdiction of the court, such court may make an order for service of said rule and a copy of said bill or petition upon such persons at their residence or place of business outside of the county or State where the land lies, in the same manner as service is made of a summons in a personal action, giving at least twenty days' notice of such hearing.

(14) Sec. 1, Act June 10, 1893, P. L., 415. In approving this bill the Governor queried whether the title: "An Act to provide for the quieting of titles to land," would support the provisions of Section 1.

If any person or persons shall neglect or refuse to appear at such return day, after twenty days' service of such rule and copy of petition, or having appeared shall refuse to join in such issue, the court may proceed to determine the rule and award and proceed with the issue in like manner as if such persons had appeared therein, and any judgment obtained in such issue shall as fully and finally conclude and determine the rights and title of such defaulting party as if such persons had appeared and joined in such issue: *Provided,* That, if, upon the return of such rule, any of the persons served shall disclaim, by writing filed, any right, title or interest in said land, all further proceedings as to such persons shall cease, and such disclaimer shall forever bar such person from ever setting up or claiming any such right or title in any court. The decree of the court in refusing the rule or issue in any such case and the judgment in such issue shall be subject to appeal by either party to the Supreme Court, in like manner as appeals are allowed to judgments and decrees of the said Court of Common Pleas.[15]

486. Railroad Companies Cannot Acquire Title to Right of Way by Adverse Possession.

A railroad company which has taken land for its right of way without compensating the owner, cannot acquire title thereto by adverse possession.[16]

(15) Sec. 2, Act June 10, 1893, P. L., 415.

(16) Connellsville Gas Coal Co. *v.* Balto. & Ohio R. R. Co., 216 Pa., 309 (1907).

CHAPTER XXII.

QUO WARRANTO.

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487. History of the Writ in Pennsylvania.

The charter of a corporation may be forfeited in Pennsylvania only by a direct proceeding in an action of *quo warranto* brought at the relation of the Attorney General, or, possibly, where there was fraud in procuring the charter, or the same was improvidently issued, by scire facias, though the latter proceeding has never been used in Pennsylvania for that purpose.[1]

Prior to the passage of the Act of June 16, 1836, P. L., 621, under which proceedings in *quo warranto* are now instituted, informations in the nature of *quo warranto* were used, following the English practice. Although the Statute of 9 Anne, providing for the filing of such information by private relators for the determination of disputes growing out of corporate rights, where the prerogative of the crown was not involved, was not specifically extended to Pennsylvania by adoption, and ratified by the act to ratify the laws in force at the Revolution, the substance of it was adopted as a part of the common law of the State.[2]

The Commissioners appointed to revise the civil code, made the following remarks on the Quo Warranto Act of 1836, as the same was reported by them: [3]

"As the law now is, the Supreme Court has the exclusive jurisdiction of writs of quo warranto and mandamus. We propose that the Courts of Common Pleas shall have, to a certain extent, concurrent jurisdiction with the Supreme Court to issue these writs. . . . We propose also to incorporate in our law the substance of the statute 9 Anne, ch. 20. This statute has never been adopted in our practice (3 Serg. & Rawle, 53), and it is not contained in the report of the judges of the Supreme Court, but its provisions have been found very useful in England, and in those States which have adopted them. . . . Judge Roberts supposed that this act was incorporated into our laws by force of the Act of 22d May, 1722, Section 13, which was passed eleven years after the statute in question (Robt. Dig., 384, note), and it is probable that the judges of the Supreme Court omitted it in their report of the statutes in force, because its chief provisions could not be carried into effect by them, except in the city and county of Philadelphia. But if the jurisdiction should be extended to the Courts of Common Pleas, as we have suggested, the provisions of this statute may be conveniently applied to those tribunals. . . . In regard to the Supreme Court, however, we propose to surmount the difficulty adverted to, by

(1) See Com. *v.* Gray's Mineral Fountain Co., 46 Leg. Int., 118 (1889); 20 Phila., 405; 8 Dau. Co., 47, where the subject of repeal of charters by scire facias is learnedly discussed.

(2) Com. *v.* Burrell, 7 Pa., 34, 35 (1847).

(3) Parke & Johnson's Digest, p. 810.

authorizing that court to direct the trial of issues in fact, taken before that Court, before the Courts of Common Pleas of the counties in which the matters in dispute occurred."

488. The Writ of Quo Warranto a Statutory Substitute for the Common Law Writ.

The writ of *quo warranto* provided for by the Act of June 16, 1836, is not the writ at common law, but a statutory substitute for it, designed, however, to be commensurate with that writ and with the information.[4]

489. Original Jurisdiction Now Exclusively in Courts of Common Pleas.

Sec. 2 of the Act of 1836, did not in any way affect the jurisdiction of the Supreme Court in proceedings in *quo warranto*;[5] but the jurisdiction of that court of writs of *quo warranto* is now limited by Sec. 3 of Art. 5, of the State Constitution to officers of the Commonwealth whose jurisdiction extends over the State, so that original jurisdiction in proceedings in *quo warranto* affecting corporations is confined to the Courts of Common Pleas.

490. Private Relators.

While the second section of the Act of 1836 provides that the writ may issue to forfeit the charters of corporations for misuser or non-user at the suggestion of any person or persons desiring to prosecute the same, these words have been practically construed out of the act, the courts having decided that a private relator has no standing in such a proceeding unless he has a particular interest in the subject matter, and no case has ever risen or probably ever will arise where an individual has had or will have such an interest as gave, or will give him such standing.[6] The Act of 1836, as drawn by the Commissioners to revise the civil code, did not contain these words, provision being made for private relators only in the case of the usurpation of corporate offices, as

(4) Report of Commissioners Appointed to Revise Civil Code, Parke & Johnson's Digest, p. 810.

(5) Murphy *v.* Farmers' Bank of Schuylkill Co., 20 Pa., 415, 417 (1853).

(6) Murphy *v.* Farmers' Bank of Schuylkill Co., 20 Pa., 415 (1853); Com. *v.* Allegheny Bridge Co., *Id.*, 185 (1852); Com. *v.* Phila., G. & N. Railway Co., *Id.*, 518 (1853); Com. *v.* R. R. Co., 10 W. N. C., 400 (1881); Com. *v.* Cluley, 56 Pa., 270 (1867); Com. *v.* Swank, 79 Pa., 154 (1875).

in the statute of Anne, but said words were inserted by an amendment to the bill when on its passage.[7]

"The usurpation of an office, established by the Constitution, under color of an executive appointment, and the abuse of a public franchise, under color of a legislative grant, are public wrongs and not private injuries, and the remedy by *quo warranto,* in this court, at least, must be on the suggestion of the Attorney General, or some authorized agent of the Commonwealth." [8]

Whether or not private relators may not have such an interest as to give them a standing in a proceeding in *quo warranto* to require a corporation to show by what right it exercises a particular franchise, other than the franchise of being a corporation, has never been decided, so far as the writer is informed. Probably the proper procedure in such case is under the provisions of the Act of June 19, 1871, P. L., 1360. An individual may proceed by *quo warranto* to forfeit the charter of a corporation violating the provisions of the Act of April 21, 1849, P. L., 673, under the terms of that act.

491. Jurisdiction Conferred.

Writs of *quo warranto* in the form and manner hereinafter provided, may also be issued by the several Courts of Common Pleas, [concurrently with the Supreme Court] in the following cases, to-wit:—

I. In case any person shall usurp, intrude into or unlawfully hold or exercise any county or township office within the respective county.

II. In case any person, duly elected or appointed to any such office, shall have done, suffered or omitted to do, any act, matter or thing, whereby a forfeiture of his office shall by law be created.

III. In case any question shall arise concerning the exercise of any office, in any corporation, created by authority of law, and having the chief place of business within the respective county.

And in any such case, the writ aforesaid may be issued, upon the suggestion of the Attorney General, or his deputy, in the respective county, or of any person or persons desiring to prosecute the same.

(7) Report of Commission to Revise Civil Code, Parke & Johnson's Digest, p 811; Com. *v.* Cluley, 56 Pa., 270 (1867).

(8) Murphy *v.* Farmers' Bank of Schuylkill Co., 20 Pa., 415, 418 (1853).

IV. In case any association, or number of persons, shall act as a corporation, or shall exercise any of the franchises or privileges of a corporation, within the respective county, without lawful authority.

V. In case any corporation as aforesaid shall forfeit, by misuser or non-user, its corporate rights, privileges or franchises, or shall do, suffer or omit to do, any act, matter or thing, whereby a forfeiture thereof shall by law be created, or shall exercise any power, privilege or franchise not granted or appertaining to such corporation.

In any such case, the writ aforesaid may be issued upon the suggestion of the Attorney General, or his deputy in the respective county, or of any person or persons desiring to prosecute the same.[9]

492. Attorney General to File Suggestions.

Whenever the Attorney General shall have reason to believe that any association as aforesaid has acted as a corporation, or exercised any of the franchises or privileges thereof, without lawful authority, or that any corporation has forfeited its corporate rights, privileges or franchises, as aforesaid, or exercised any power, privilege or franchise, not granted or appertaining to such corporation, it shall be his duty to file or cause to be filed, a suggestion as aforesaid, and to proceed thereon for the determination of the matter.[10]

493. Attorney General to Proceed Against Corporations Alleged to Have Violated Duties Imposed Upon Them by Law.

In all cases in which heretofore any privileges or immunities have been granted to any corporation, by an act of the General Assembly of the Commonwealth, upon terms and conditions

(9) Sec. 2, Act June 14, 1836, P. L., 621. The Act of May 3, 1850, P. L., 654, provides that District Attorneys shall have all powers formerly belonging to Deputy Attorneys General. A District Attorney may, therefore, probably proceed in quo warranto against a corporation or persons claiming to act as a corporation, within his county. Gilroy *v.* Com., 14 W. N. C., 428 (1884). See opinion of the Attorney General in Consolidated Stock Exchange of Phila., 31 Pa. C. C., 226 (1905); Com. ex rel. *v.* Reilly, 14 D. R., 531 (1905); South Manheim Township's Supervisor, 33 Pa. C. C., 630 (1907).

(10) Sec. 3, Act June 14, 1836, P. L., 621.

in such act prescribed, for the knowing and intentional neglect or refusal to perform and comply with which terms and conditions, a forfeiture or determination of such privileges and immunities is provided for in the act, it shall be the duty of the Attorney General of the Commonwealth, upon complaint made to him by any party whose rights or interests are affected by such neglect or refusal, to institute forthwith proceedings, in a court of competent jurisdiction, to ascertain the fact of such neglect or refusal; and if such neglect or refusal shall be adjudged by such court to have occurred, then, and in such case, all the rights, privileges, powers and immunities granted to said corporation, upon such terms and conditions, shall forthwith cease and determine; and thereupon the Governor of the Commonwealth shall provide such organization as may be needful to manage any such property, until otherwise directed by the Legislature: *Provided, however,* That all expenses incident to the management thereof shall be paid from its own proceeds; and nothing in this act contained shall be deemed as authorizing any liability against, or expenditure by, the Commonwealth of Pennsylvania: *Provided,* That when proceedings under the provisions of this act are commenced, in any court other than the Supreme Court, the right of appeal to the Supreme Court shall exist to either party, as in other cases: *Provided, further,* This act shall not apply to bridge companies.[11]

494. Form of Writ.

Writs of *quo warranto* shall be in the following form, to-wit: County, ss. The Commonwealth of Pennsylvania: To the sheriff of said county, greeting: We command you that you summon , so that be and appear before our court to be holden at , in and for the , on the day of next, and then and there to show by what authority claim to exercise the office of , in the county of , or to show by what authority he or they exercise within the said county [or county of] the liberties and franchises following, to-wit: (Setting them forth or otherwise, as the case may be) and have you then there this writ: Witness, etc.[12]

(11) Act of April 1, 1870, P. L., 45.
(12) Sec. 4, Act June 14, 1836, P. L., 621.

495. When Writ May Issue.

The writ aforesaid, may be issued [out of the Supreme Court, with the leave of the said court, in term-time, or any judge of the said court in vacation; and] out of the respective Court of Common Pleas with the leave of the said court, in term-time, or of the president judge thereof, in vacation; and such writ may be made returnable at any time within term, at the discretion of the court or judge granting the same.[13]

Service of the writ of *quo warranto* and the writ of mandamus may be made upon the defendant wherever found, as in the case of a summons.[13*]

496. Service of Writ—Judgment by Default.

The writ aforesaid, shall be served at least ten days before the return day, in the same manner as a writ of summons in a personal action; and if the party against whom such writ shall be issued shall not appear, judgment by default may be taken, without further process, in the manner allowed in a personal action.[14]

497. Requirements as to Suggestions.

Every suggestion as aforesaid, shall set forth the facts as fully as has heretofore been required, in informations aforesaid; it shall be verified by affidavit and filed of record in the cause; and in every case, the name of the person at whose instance the writ shall issue, shall be endorsed thereon.[15]

498. Joinder of Persons in Writ.

If it shall appear to the court or judge aforesaid, that the several rights of different persons may be properly determined by one writ, it shall be lawful for such court or such judge to make such order or orders, for the introduction or addition of such persons into the writ, or for notice to such persons to appear and take defense, as shall be reasonable and just.[16]

499. Pleadings.

The defendant in such writ shall answer, plead or demur to the

(13) Sec. 5, Act June 14, 1836, P. L., 621.
(13*) Par. 13, Sec. 1, Act July 9, 1901, P. L., 614.
(14) Sec. 6, Act June 14, 1836, P. L., 621.
(15) Sec. 7, Act June 14, 1836, P. L., 621.
(16) Sec. 8, Act June 14, 1836, P. L., 621.

suggestion filed as aforesaid; he may traverse all or any of the material facts contained therein, as in other cases; and the person or persons at whose instance such writ shall have been issued, shall reply, take issue or demur, and thereupon issue shall be joined in due course, as in other cases; and the court shall make such orders from time to time, in respect to such pleadings, as shall expedite the decision of the cause, consistently with reasonable convenience to the parties.[17]

500. Judgment.

If the defendant in any *quo warranto,* as aforesaid, whether a natural person or persons, or a corporation, be found or adjudged guilty of usurping or intruding into, or unlawfully holding or exercising the office, franchise, privilege or power mentioned in such writ, the court shall give judgment that such defendant be ousted, and altogether excluded from such office, franchise, privilege or power, and that the Commonwealth, or party suing the writ, as the case may be, recover costs from the defendant.[18]

501. Costs.

If judgment be given for the defendant in any such writ, and the proceedings have been instituted on the relation of any private prosecutor, the court shall also give judgment, that the defendant recover his costs of such relator, to be levied by execution, as in cases of debt; if the proceedings have been instituted by the Attorney General at his own instance, it shall be lawful for the court, in their discretion, on giving judgment for the defendant, to order that the costs be paid by the county in which the matters complained of were alleged to have taken place.[19]

502. Execution by Writ of Injunction.

If judgment of ouster and exclusion, as aforesaid, be given against any defendant, execution thereof shall be had by a writ of injunction, which shall be awarded by the court against such defendant, whether a natural person or persons, or a corporation; such injunction shall recite the judgment of the court and shall

(17) Sec. 9, Act June 14, 1836, P. L., 621.
(18) Sec. 11, Act June 14, 1836, P. L., 621.
(19) Sec. 12, Act June 14, 1836, P. L., 621.

enjoin the defendant or defendants from exercising the office, franchise, privilege or power mentioned therein; and obedience thereto may be compelled by attachment and sequestration, in like manner as in other cases of injunction.[20]

503. Judgments Rendered by Default May be Opened.

If such injunction shall have been issued upon a judgment rendered by default, as aforesaid, the defendant therein may, nevertheless, upon the payment of costs, and reasonable notice to the adverse party, and such other terms as the court shall deem equitable, plead to the suggestion as aforesaid, and thereupon the parties shall proceed to issue and trial, in like manner as if the defendant had appeared at the return of the writ, and had pleaded in due course; and if judgment shall be rendered in favor of such defendant, the judgment by default shall be taken off and the injunction aforesaid shall thenceforth be dissolved.[21]

504. Appeal.

It shall be lawful for any person aggrieved by the judgment of any Court of Common Pleas, upon any writ of *quo warranto* as aforesaid, to remove the same by writ of error, into the Supreme Court for the proper district; but it shall be lawful for the court to which such writ of error shall be directed, to award execution as aforesaid, notwithstanding such writ of error, if, in the discretion of the court, the case shall appear to require it.[22]

505. When Writ of Error Returnable.

Every such writ of error may be made returnable forthwith, if the Supreme Court shall be in session in the proper district; and shall be heard and decided by the judges thereof, at the term to which it is returnable.[23]

506. Writs of Quo Warranto Not a Bar to Prosecutions for Breach of Statute.

Provided, That nothing herein contained shall debar any prose-

(20) Sec. 13, Act June 14, 1836, P. L., 621.
(21) Sec. 14, Act June 14, 1836, P. L., 621.
(22) Sec. 15, Act June 14, 1836, P. L., 621.
(23) Sec. 16, Act June 14, 1836, P. L., 621.

cution for breach of an Act of Assembly in relation to corporations, corporate or other officers, or persons acting as corporations without lawful authority.[24]

507. Substitution of Successors to Defendants.

It shall be lawful for any court within this Commonwealth, in which any trial or question arising on a writ of *quo warranto* is or may hereafter be pending, on the expiration of the term of office, or the resignation of the relator or relators, or person or persons against whom the same has or may have issued, if said court shall be of opinion that the attainment of substantial justice, and the trial of the rights in question, requires the substitution of the person or officer elected or appointed to fill the place of such relator or relators, defendant or defendants, to order and decree that the person or persons so elected or appointed shall be substituted in the room or stead of the person or persons so resigning, or whose term of office has expired, and direct such notice to be served on the person or persons so substituted as to said court shall seem just and reasonable; after which the cause shall proceed to final hearing and adjudication, in the same manner as though no change had taken place.[25]

508. Courts to Pass on Legality of Election of Persons Claiming Offices, as Well as That of Persons Occupying the Same.

In all questions arising on writs of *quo warranto* between persons claiming to be duly elected to fill any office, it shall be lawful for the court trying the case to decide both on the legality of the election of the party claiming said office, as also of the party in possession of the same, and if judgment of ouster is given against the party in possession, said court may decree that the office shall be held by the person or persons who they shall be of opinion is duly elected; and after judgment of ouster, when it cannot be ascertained who is duly elected, said court may order a new election to fill said office, to be held at such times thereafter as shall be appointed by said court.[26]

(24) Sec. 17, Act June 14, 1836, P. L., 621.

(25) Sec. 12, Act April 13, 1840, P. L., 323.

(26) Sec. 13, Act April 13, 1840, P. L., 323. The purview of this act "is broad enough to cover all questions arising on writs of quo warranto, between rival claimants of elective offices, though some of them may, as

509. When Officers of a Corporation are Ousted Court May Appoint Trustees to Manage Affairs of Corporation.

When the persons claiming to be officers of any corporation shall be ousted by the judgment of any court, on a writ of *quo warranto,* it shall be lawful for said court to appoint not less than three nor more than nine trustees to take charge of said corporation, who shall be selected and chosen by the said court, out of such persons as are, by the charter of said corporation, competent to be elected officers thereof; and said trustees so appointed shall exercise and perform all the duties of officers of the said corporation, until others shall be elected in their stead, pursuant to the law regulating said corporation, or the order of court, where there is no sufficient law providing for the same.[27]

510. Property of Dissolved Corporation to Pass to Officers of the Same in Trust.

Whenever any corporation incorporated under the laws of this Commonwealth, shall have been dissolved by judgment of ouster, upon proceedings of *quo warranto* in any court of competent jurisdiction, all the estate, both real and personal, of which such corporation are (is) in any way seized or possessed, shall pass to and vest in the persons, who, at the time of such dissolution, are the officers of such corporation, in trust, to hold the same for the benefit of the stockholders and creditors of the corporation.[28]

511. Appointment of Receivers by the Supreme Court.

The Supreme Court, or any judge thereof, siting at *nisi prius,* shall, upon the petition of any stockholder or creditor of such corporation, appoint a receiver who shall have all the powers of a receiver appointed by a court of chancery, to take possession of all the estate, both real and personal, thereof, and make distribution of the assets among the persons entitled to receive the same, according to law: *Provided,* That written notice, as may be directed by the court, shall be given to the persons, or a majority

here, claim to hold by temporary legislative appointment. The object of the statute is to invest the court with power to settle the pretensions of all the claimants, in the same proceeding, whether they be complainants or defendants, and whether in or out of possession." Com. ex rel. Claghorn *v.* Cullen et al., 13 Pa., 132 (1850).

(27) Sec. 14, Act April 13, 1840, P. L., 323.

(28) Sec. 1, Act April 4, 1872, P. L., 46.

of them, who were at the time of the dissolution, officers of the corporation, of the intention, time and place of presenting such petition. *And provided further,* That it shall be the duty of such receiver to give notice of his appointment, time and place of meeting, to all the stockholders of such corporation, and to advertise the same as the court may direct.[29]

The appointment of a receiver is no part of the proceedings in *quo warranto,* and hence the Supreme Court may still appoint receivers of corporations dissolved by *quo warranto* under the provisions of the Act of April 4, 1872. Not determined whether this power is an exercise of original jurisdiction which was taken away by the Constitution of 1874.[30]

The provisions of this act shall also apply to any corporation that has been heretofore dissolved by judgment of ouster upon proceedings of *quo warranto,* in any court of competent jurisdiction, the affairs of which have not been settled and adjusted.[31]

512. Appointment of Receivers by Courts of Common Pleas.

Whenever any corporation incorporated under the laws of this Commonwealth shall be dissolved by judgment of ouster upon proceedings of *quo warranto* in any court of competent jurisdiction the said court, or in vacation any one of the law judges thereof shall have power to appoint a receiver who shall have all the powers of a receiver appointed by a court of chancery, to take possession of all the estate, both real and personal thereof, and make distribution of the assets among the persons entitled to receive the same according to law. The powers of such receiver may continue as long as the court deems necessary for said purposes, and he shall be held to supersede an assignee of the corporation in possession.[32]

513. Court of Common Pleas of Dauphin County Has Jurisdiction Throughout the State in Cases of Quo Warranto.

The Act of April 7, 1870, P. L., 57, confers upon the Court of Common Pleas of Dauphin county, jurisdiction to issue a writ

(29) Sec. 2, Act April 4, 1872, P. L., 46.

(30) Com. *v.* Order of Vesta. Kennedy's Appeals, 156 Pa., 531 (1893). Fraternal Guardians' Assigned Estate, 159 Pa., 603 (1894).

(31) Sec. 3, Act April 4, 1872, P. L., 46.

(32) Sec. 1, Act April 26, 1893, P. L., 26.

of *quo warranto* against a corporation not having its place of business, and not exercising or claiming to have or exercise, any powers, privileges or franchises, within said county.[33] The language of the said Act of 1870 is:

"The Court of Common Pleas of Dauphin county is hereby clothed with jurisdiction *throughout the State* for the purpose of hearing and determining all suits, claims and demands whatever, at law or in equity, in which the Commonwealth may be party plaintiff. . . . ."

The Act of July 10, 1901, P. L., 637, provides that the "Courts of Common Pleas of the several counties of this Commonwealth are hereby clothed with jurisdiction in all cases in which the Commonwealth is a party. . . . ."

514. Rule to Show Cause.

A preliminary rule to show cause is not indispensable to the issuance of the writ at the instance of a private relator. The granting of the rule is in the sound discretion of the court. If it appear at any time during the trial that the writ has been improvidently issued, the court may refuse to entertain it.[34]

"Questions may arise as to the right of authority of the relator to act for the Commonwealth, and in such cases a rule to show cause would, ordinarily, be the better initial proceeding, but whether a rule or the writ shall issue in the first instance is a matter of practice, and largely within the discretion of the court. . . . . The preliminary rule is more elastic than the writ and has some advantages, but whether to use it or not is a matter for the court in each case on its own circumstances. The best and most convenient practice is stated by Paxson, J., in Com. *v.* Bank of America, 10 Phila., 156, but the rules there laid down . . . . are subject to legal discretion in their application." [35]

No rule to show cause is required when the Commonwealth, through her Attorney General, applies for a writ.[36]

(33) Com. *v.* Pa., Slatington & N. E. R. R. Co., 2 Dauph. Co. Rep., 283 (1883); 14 W. N. C., 60; 40 Leg. Int., 435.

(34) Gilroy et al. *v.* Com., 105 Pa., 484 (1884); Com. ex rel. Gordon et al. *v.* Graham et al., 64 Pa., 339 (1870). See Com. *v.* Swank, 79 Pa. 154 (1875); Com. *v.* Walter, 83 Pa., 105 (1876); 3 W. N. C., 376; Com. *v.* Cluley, 56 Pa., 270 (1867).

(35) Com. *v.* Kistler, 149 Pa., 345 (1892).

(36) Com. *v.* Walter, 83 Pa., 105 (1876); 3 W. N. C., 376.

515. Not a Writ of Right.

Quo warranto is not a writ of right, but issues only in the discretion of the court,[37] and a writ of error does not lie to review the exercise of such discretion. Philips *v.* Commonwealth *ex rel.* James, 98 Pa., 394 (1881) was such a case of a writ of error, but the question was not raised therein. If it had been, the writ would probably have been quashed.[38]

516. Not a Criminal Proceeding.

It was held that the information in the nature of *quo warranto*, in use prior to the Act of June 16, 1836, though criminal in form, was designed solely for the determination of civil rights.[39] The present writ of *quo warranto* is a civil proceeding, the commissioners to revise the civil code having substituted a suggestion for an information. "As the object is of a civil nature, the proceedings ought not to be commenced in the form of a prosecution for a crime."[40]

It seems, however, that a writ of *quo warranto* brought to enforce the provisions of Sec. 12, Art. 16, Constitution of Pennsylvania, and Secs. 1 and 2 of the Act of June 5, 1883, P. L., 84, providing for the forfeiture of telegraph lines, etc., which have been purchased or controlled by competing telegraph companies, is a criminal procedure and cannot be removed from a State court having jurisdiction, to a United States Circuit Court.[41]

517. Corporate Elections and Offices.

Quo warranto is the only method of contesting the validity of a corporate election, where the election was regular, quiet and orderly. But where it is shown in advance that by reason of fraud, violence or other unlawful means a fair and honest election cannot be held, the power of supervision and control of cor-

(37) Com. *v.* Cluley, 56 Pa., 270 (1867); Com. *v.* Swank, 79 Pa., 154 (1875); Com. ex rel. Pughe *v.* Davis, 109 Pa., 128 (1885).

(38) Com. *v.* Davis, 109 Pa., 128 (1885).

(39) Com. *v.* Commissioners of Phila., 1 S. & R., 382.

(40) Report of Commissioners to Revise the Civil Code, Parke & Johnson's Digest, 811.

(41) Com. ex rel. Atty. Gen. *v.* W. U. Tel. Co., 1 Dauph. Co. Rep., 141 (1889).

porations conferred by the Act of June 16, 1836, P. L., 621, upon courts of equity, will be used to supervise such election.[42]

A proceeding in *quo warranto,* and not one under the provisions of the last clause of Sec. 8 of the Act of April 29, 1874, is the proper method of trying the title of an individual to an office in a corporation. The object of said part of said section is wholly to set aside an invalid election.[43]

There is no provision in the *quo warranto* act of June 14, 1836, P. L., 621, for making a corporation a party in a proceeding involving a question as to who shall constitute the board of management. The act contemplates issues between individuals.[44] Held, on appeal, however, that the corporation concerned in this cause should have been allowed to intervene. Appeal of Masonic Home of Penna., 188 Pa., 23 (1898).

Under the Act of 1836, Sec. 8, giving the courts discretionary power to try "the several rights of different persons" by one writ of *quo warranto,* the title to different offices may be determined in one writ, if the title of the incumbents as to all such offices depends upon the same votes at the same election, and the decision as to the validity of the election would be equally conclusive on the rights of all.[45]

A stockholder in a corporation who has been elected a director, has a standing in *quo warranto* proceedings to contest the right of other persons to hold the office of director, though they were elected at the same meeting at which he was elected, and his title is not disputed. As a stockholder he has a right to have the votes properly counted, and the affairs of the company committed to the charge of the officers legally elected by a majority of the stockholders.[46]

A writ of *quo warranto* brought within the term of an office, may be tried after the term has expired, but title to a past and defunct office cannot be tried in a proceeding instituted, not against incumbents, during its existence, but against those succeeding the next year.[47]

(42) Jenkins et al. *v.* Baxter et al., 160 Pa., 199 (1894).
(43) Com. *v.* Straus, 32 Pa. Super. Ct., 389 (1907).
(44) Com. ex. rel. Henderson *v.* Masonic Home, 6 D. R., 732 (1897).
(45) Com. ex rel. Morris *v.* Stevens et al., 168 Pa., 582 (1895).
(46) Com. ex rel. Morris *v.* Stevens et al., 168 Pa., 582 (1895).
(47) Com. *v.* Smith, 45 Pa., 59 (1863).

The Act of June 14, 1836, Sec. 2, P. L., 621, confers no jurisdiction upon the Courts of Common Pleas to issue writs of *quo warranto* to persons holding positions in private corporations, except in questions concerning the exercise of strictly corporate offices. No authority is given to issue the writ against a mere servant, employe or agent of such corporation. A professor in the University of Lewisburg, was held to be such an employe.[48]

A writ of *quo warranto* will not issue for the purpose of inquiring into the regularity of an election of officers created by another State, although the charter may provide that a branch office shall be maintained in Pennsylvania, and most of the directors actually reside in that State.[49]

An Act of Assembly provided that no member of the councils of Philadelphia should be at the same time a surety for the city treasurer, and that, for violating this provision, a councilman should forfeit his membership, be guilty of a misdemeanor and be fined. Another act provided that the members of said councils should judge and determine the qualifications of their members in the same manner that the Legislature judged of the qualifications of its members. Members of councils were sureties for a city treasurer. Held, that this constituted a forfeiture of their offices as councilmen; that the court had jurisdiction to inquire of the forfeiture; that the forfeiture arose from the unlawful relation of surety and councilman, and not upon conviction of the misdemeanor; that the power of councils to impeach, try and remove a member for the misdemeanor is not incompatible with the judicial power to oust an usurping officer or one holding over.[50]

When a judgment of ouster has been entered against a person claiming to be an officer of the corporation, and the corporation was not a party to the proceeding, the corporation has a right, subsequently, to intervene for the purpose of maintaining a rule to open the judgment of ouster. It seems that an appeal from an order discharging a rule to open a judgment of ouster is authorized by Act of May 21, 1891, P. L., 101.[51]

(48) Philips *v.* Com. ex rel. James, 98 Pa., 394 (1881); 11 W. N. C., 362.

(49) Com. *v.* Leisenring, 39 Leg. Int., 402; 15 Phila., 215 (1882).

(50) Com. *v.* Allen, Huhn & Shane, 70 Pa., 465 (1872). See Com. *v.* Walter, 83 Pa., 105 (1876); Leonard *v.* Com., 3 Cent. Rep., 628 (1886).

(51) Com. ex rel. Henderson *v.* O'Donnel, 188 Pa., 23 (1898).

Quo warranto lies against the directors of a railroad company, at the suit of a private relator, if he show that he has title to an office, and that the respondent is usurping the exercise of its duties.[52]

A *quo warranto* will not be allowed where the question will be decided by a new election before the case can be heard and decided.[53]

The right to an office in a corporation cannot be tried in a proceeding for an injunction.[54]

A stockholder may proceed in *quo warranto* to oust an officer of a corporation though there be no adverse claimant of the office.[55]

518. Amendments to Suggestions—Motions to Quash the Writ.

The Commonwealth may amend the suggestion on which a writ of *quo warranto* is issued either on or at any time before trial. The Attorney General may disclose in his information the specific ground of forfeiture, or he may merely set forth the franchises alleged to have been illegally exercised, and call upon the defendant to show by what authority they are held. The plea should either deny the facts or set forth the authority. The replication may then allege the facts relied on as working a forfeiture. This may be denied or demurred to by the defendant. Since the suggestion may be amended at any time, it follows that objections to matters of form, which may be removed by amendment, do not furnish a ground for quashing the writ.[56]

"Since the case in 4 Casey, 28 Pa., which was thirteen years ago, motions to quash seem to have fallen into disuse, and the course pointed out by the Act of June 14, 1836, has been pursued, the defendants either answering, pleading or demurring to the suggestions filed. Upon a motion to quash it must be for some defect in the suggestion itself, and not for any matter outside of it." [57]

(52) Com. *v.* Filer, 30 Pitts. L. J., 286.

(53) Com. *v.* Cosgrove, 4 Lanc. Times, N. S., 13; Com. *v.* Amsden, Ibid, 53.

(54) Nolde's Appeal, 2 Mona., 169 (1888); O'Shea *v.* Flannery, 26 Pa., C. C., 89 (1901).

(55) Com. *v.* Detwiller, 1 Northampton Co. Rep., 257 (1888).

(56) Com. *v.* Commercial Bank of Pa., 28 Pa., 383 (1857).

(57) Com. ex rel. Gordon et al. *v.* Graham et al., 64 Pa., 339 (1870). See, however, Com. *v.* Swank, 79 Pa., 154 (1875).

A writ of *quo warranto* will not be quashed because of a defective service; the proper remedy is by a motion to set aside the service.[58]

519. Special Franchises.

Quo warranto lies not only to dissolve a corporation, but to oust one of any particular franchise or power which it may attempt to exercise. "A leading purpose of the remedy is, to prevent corporations and officers from usurping an ungranted franchise or function at which it is aimed, and then the judgment always is, that they be excluded or ousted of that, without affecting the corporations or officers in regard to any of their proper franchises or functions. . . . . The penalty annexed by due course of law to the usurpation of functions is, ouster to the extent of the usurpation, and costs." [59]

In a *quo warranto* proceeding against the owners and operators of a ferry, the exclusive franchise of which was conditioned on the grantees keeping the ferry at all times in good order and repair, and furnishing the needful facilities for ferrying, the suggestion set forth failure to comply with the conditions, with such specifications as that the defendants have refused on divers occasions to ferry travelers when so requested, etc.; not setting forth specific acts of such refusal. Held, that after a trial on the merits and a verdict against the defendants, the court would not arrest the judgment on the ground that the averments in the information were too general.[60]

520. Obtaining Permission to Use the Name of the Commonwealth.

Where it is desired to proceed by *quo warranto* to forfeit the charter of a corporation for misuser or non-user of its franchises, or against an association for usurping the franchises of a corporation, it will be necessary to procure permission of the Attorney General to use his name in such proceeding. The procedure is by petition addressed to that officer, setting forth fully the facts in the case, and praying that he file a suggestion in the proper court, requiring such corporation to show why the fran-

(58) Com. *v.* Getz, 4 D. R., 391 (1894).

(59) Com. *v.* Del. & Hud. Canal Co., 43 Pa., 295 (1862); Com. ex rel. Atty. Gen. *v.* Sturtevant, 182 Pa., 323 (1897).

(60) Com. ex rel. Atty. Gen. *v.* Sturtevant, 182 Pa., 323 (1897).

chises granted to the corporation should not be declared forfeited, or by what authority such association exercises the franchises of a corporation, according to the facts in the case. Notice of the filing of the petition should be given to the parties concerned, and a date is fixed by the Attorney General for a hearing upon the application, at which hearing a *prima facie* case is required to be made out. Upon such a case being established, the Attorney General prepares the suggestion, and thereafter, unless the case involve general public interests, the connection of the Attorney General with the case is usually merely nominal.

521. Mandamus to Compel the Attorney General to File Suggestions.

The Act of May 7, 1887, P. L., 94, provides that on the complaint of any stockholder of a railroad company, or of any two reputable citizens resident on the line of the road, that said company is about to issue capital stock contrary to the provisions of Sec. 7 of Art. 16, of the Constitution, and of said act to the same effect, the Attorney General shall institute proper proceedings in the name of the Commonwealth to enforce the provisions of said act. In a proceeding in mandamus to compel the Attorney General to file a suggestion in *quo warranto* under said act, it was held, that a street railway company or traction company was a railroad within the meaning of the act, and that before the Attorney General is subject to a writ of mandamus to compel him to proceed under the Act of 1887, he has a right to know the strength of the case he is asked to present in the name of the Commonwealth, and unless the petitioner shows a *prima facie* case, under the statute, when the mandamus is asked for, it should be presumed that the refusal of the Attorney General rested on his conclusion, from all the facts before him, that the complaint could not be sustained by proof.[61]

Probably a mandamus would not lie to compel the Attorney General to file a suggestion in *quo warranto* under the Act of June 16, 1836, though one would doubtless issue to compel him to act upon a petition for such a writ. But, if, under the Act of 1887 he has the discretion to determine whether or not a *prima facie* case has been made out in a given cause, and to refuse to

(61) Cheetham *v.* McCormick, 178 Pa., 186 (1896).

proceed, if in his opinion no such case has been made—as held in the case cited—which is practically the discretion given him by the Act of 1836, and he may yet be mandamused to proceed under the Act of 1887, it is hard to see why he may not be mandamused to proceed under the Act of 1836.

522. Laches in Proceedings by Quo Warranto.

While, as a general rule, laches is not imputable to the State, where there has been unreasonable delay in instituting the proceeding, such delay will have weight in determining whether the State is entitled to demand a forfeiture, and, in the case of private relators, laches will have its usual effect.[62]

523. Forfeiture of Charter for Misuser or Non-user.

Quo warranto lies to forfeit the charter of a corporation for misuser or non-user,[63] but a suspension for a limited time by a corporation of the use of its franchises does not constitute such non-user as will warrant a forfeiture, nor will isolated cases of misuser, producing no injurious consequences and not persisted in, warrant the same. In general, to work a forfeiture, there must be something wrong arising from wilful abuse and improper neglect.[64]

The courts proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, and a forfeiture will not be allowed, except under express limitation, or for a plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization.[64*]

524. Commonwealth May Proceed by Quo Warranto, Notwithstanding a Decree That Matters Remain in Statu Quo.

In a controversy between contending factions of a beneficial

(62) Com. *v.* N. Y., L. E. & W. Coal & R. R. Co., 10 Pa. C. C., 129 (1890). See Bradford *v.* N. Y. & Pa. Telephone & Teleg. Co., 206 Pa., 582 (1903). See also Com. *v.* Hulings, 129 Pa., 317 (1889), where it was held that a delay of five years in instituting proceedings against claimants of a ferry franchise entitled the defendants to judgment. See Sec. 1106.

(63) Clineclamouche Lumber & B. Co. *v.* Com., 100 Pa., 438 (1882). See Sections 44 and 95.

(64) Com. *v.* N. Y., L. E. & W. Coal & R. R. Co., 10 Pa. C. C., 129 (1890).

(64*) High on Ex. Legal Remedies, Sec. 649, cited with approval in Com. *v.* Monongahela Bridge Co., 216 Pa., 108 (1906).

association, in which the Supreme Court decreed that matters should remain in *statu quo* until the next session of the Supreme Lodge, it was held that it was not violative of such decree for the Commonwealth, in the meantime, to institute proceedings in *quo warranto* and obtain a judgment of ouster against the corporation; and where the Supreme Lodge accepts such a decree as final and adjourns *sine die,* the minority party has no standing to appeal from the judgment of ouster.[65]

525. Escheat of Lands Unlawfully Held by a Foreign Corporation.

Lands held by a foreign corporation in Pennsylvania, contrary to the provisions of the Act of April 26, 1855, P. L., 329, may be escheated by means of a proceeding in *quo warranto.*[66]

526. Special Remedies Not Exclusive of Quo Warranto.

Where special remedies are given against corporations for non-user or misuser, they are not exclusive of the Commonwealth's right to proceed by *quo warranto.*[67]

527. Practice.

In a proceeding in *quo warranto* to forfeit the charter of a railway company, the trustee in a mortgage given by the company to secure its bonds and certain bondholders will not be permitted to intervene and defend the proceeding. The forfeiture of the right to be a corporation will not affect the franchise to operate a railroad which is the franchise covered by the mortgage in question.[67*]

Filing an information against a corporation by its corporate name to pronounce a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchises, is to admit the existence of the corporation. To avoid such admission, the information should be filed against the individuals composing the corporation.[68]

(65) Com. *v.* Order of Solon, 166 Pa., 33 (1895). See Order of Solon *v.* Folsom, 161 Pa., 225 (1894).

(66) Com. *v.* N. Y., L. E. & W. R. R. Co., 114 Pa., 340 (1886); 132 Pa. 591 (1890).

(67) Com. *v.* Towanda Water Wks., 1 Mona., 500 (1888); Birmingham & Eliz. Tpk. Rd. Co., 1 Penny., 458 (1881).

(67*) Com. ex rel. *v.* Altoona & Philipsburg Connecting R. R. Co., 31 Pa. C. C., 646 (1905).

(68) Com. *v.* N. Y., L. E. & W. C. & R. R. Co., 10 Pa. C. C., 129 (1890).

In a proceeding in *quo warranto,* the defendant has the affirmative of the pleadings. The Attorney General, in the first instance, has only to set forth the franchises alleged to be illegally exercised and to call on respondent to show by what authority they are held.[69]

A plea to a *quo warranto* that the defendants have a right to exercise the franchises from which it is sought to oust them, accompanied by a negation of the allegations of the suggestion, is not a plea of *non usurpavit,* or a disclaimer, but is a valid plea.[70]

All Courts of Common Pleas, under the Act of 1836, have general jurisdiction by *quo warranto,* over the subject matter of forfeiture for non-user or misuser of corporate rights. Jurisdiction over any individual corporation depends, therefore, not on the purpose sought by the writ, but on getting the particular defendant into court. It is a matter of service or appearance.[71]

In a proceeding in *quo warranto,* an order for service of notice of the writ on persons interested, residing outside of the State, may be made under the provisions of the Act of June 14, 1836, Sec. 8, P. L., 621.[72] Such order must be served in the same manner as a summons.[73]

Where the Attorney General was desirous to discontinue *quo warranto* proceedings instituted by him, application was made on behalf of certain persons, asking him to be allowed to file a suggestion of their title by way of amendment to the suggestion, and to be substituted as relators in place of the Attorney General. Held, that the Amendment Act of May 4, 1852, P. L., 574, did not authorize such amendment.[74]

528. Miscellaneous.

Quo warranto is the proper remedy for violations of law alleged to have been committed before the granting of letters patent to a corporation, such as the failure to pay in the ten per

(69) Com. *v.* Steelton Mut. Relief Assn., 2 Dauph. Co. Rep., 200 (1881).
(70) Com. *v.* Crosscut R. R. Co., 53 Pa., 62 (1866).
(71) Com. *v.* Order of Solon, 166 Pa., 33 (1895).
(72) Com. *v.* Dillon, 61 Pa., 488 (1869).
(73) Com. *v.* Quin, 1 W. N. C., 313 (1873).
(74) Com. *v.* Dillon et al., 81* Pa., 41 (1870).

centum of capital stock, and in such case the writ should issue against the corporation, where there is a formal corporation.[75]

If the complainant sustained a legal injury, he is not entitled to a remedy by *quo warranto,* but to an action in his own name for the damages sustained.[76]

(75) Com. *v.* Gray's Mineral Fountain Co., 46 Leg. Int., 118 (1889). But see Com. *v.* McKean Co. Bank, 32 Pa., 185 (1858).

(76) Com. *v.* Allegheny Bridge Co., 20 Pa., 185 (1852).

CHAPTER XXIII.

STOCKHOLDERS.

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529. Alien Friends May be Stockholders in Pennsylvania Corporations.

In Pennsylvania a resident alien friend may deal as freely in all forms of property, whether personal or real, as any natural born citizen, (Sec. 1, Act of February 10, 1807, 4 Sm. L., 362—limited by Act of March 24, 1818, 7 Sm. L., 133, Sec. 1, to five

thousand acres of land, etc.) wherefore, in the absence of any organic requirement that shareholders shall be citizens, a resident alien friend may become a shareholder in a Pennsylvania corporation.

Though under some statutes the advantage of corporate powers was reserved, in the first instance, for citizens of the State, yet when they have once been granted, there is no restriction put upon their proper exercise by any citizen of the United States, or by an alien friend, subsequently becoming the owner of shares in such a corporation.

A non-resident or alien friend stockholder takes his shares with all the rights and privileges which pertain to them in the hands of a citizen; he may vote upon them, and where no other qualification than the ownership of shares is required of directors, or where there is no requirement at all, he may lawfully become a director in such corporation.[1]

530. Stockholders May Deal With Their Corporations as Strangers.

Stockholders who are not officers or agents of their respective corporations may deal with them as with a stranger. The fact that a stockholder has been the chief promoter of a company more than a year prior to the transaction complained of, has no bearing upon the validity of such transaction.[2]

531. Rights and Powers of Stockholders.

Where an individual becomes a member of a corporation, there is an implied agreement on his part that a majority of the stockholders, at a regular meeting of the voters, shall control the funds of the company, if they do so in accordance with their charter rights. Every stockholder in the company surrenders his personal control of that property which he has invested in the stock to the jurisdiction of a majority.[3]

A stockholder may not interfere in the management of the business of his corporation which is entrusted to the directors thereof, or to the stockholders as a body. He may not have a lease set

(1) Com. *v.* Detwiler, 131 Pa., 614 (1890); 25 W. N. C., 329.

(2) Russell *v.* Rock Run Fuel Gas Co., 184 Pa., 102; 41 W. N. C., 364 (1898).

(3) Carpenter *v.* Burden, 2 Pars., 24 (1843).

aside because it is detrimental to his interests, where the same was executed by the directors in good faith and was within the powers of the corporation.[4]

He is bound by the action of a majority of the stockholders in any matter within their powers, in the absence of fraud,[4*] but such majority cannot change the interests of a stockholder in the assets of a corporation, or dispose of the same without his consent.[5]

Unless they are authorized, the individual members of a corporation cannot bind it by an express promise, nor can corporate engagements be implied from their unauthorized acts or declarations.[6]

The action of a majority of the stockholders of a corporation to dissolve a corporation or discontinue its business is binding on the minority stockholders,[7] but the action of a majority of the stockholders of a corporation undertaking to carry on a business which is not fairly within the scope of the business described in its charter is *ultra vires,* and a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter, and enjoin or set aside any acts which do not conform to those limits.[8]

Stockholders may authorize the board of directors to make an assignment of the property of the corporation with a view to closing out its business, and such an assignment is valid as against an attachment, even before ratification by the stockholders.[8*]

An injunction will not, however, be granted at the suit of a stockholder enjoining a corporation from discontinuing a particular branch of its business, authorized by its charter.[9]

A stockholder cannot be compelled by the action of a majority of the stockholders to exchange his stock for stock in another corporation. Where a railroad company was authorized by special

(4) Schaaber's Appeal, 2 Mona., 435 (1889).

(4*) McKean *v.* Biddle, 181 Pa., 361 (1897).

(5) McCurdy *v.* Myers, 44 Pa., 535 (1863).

(6) Allegheny County Workhouse *v.* Moore, 95 Pa., 408 (1880).

(7) Com. *v.* Order of Solon, 166 Pa., 33 (1895); 4 Thomp. Corp., Sec. 4443.

(8) Cook on Corpns., Sec. 680.

(8*) Richards *v.* Wright, 4 Walk., 306 (1881).

(9) Keller *v.* Northern Liberty M. L. & Life Ins. Assn., 2 W. N. C., 365 (1876).

act to transfer its assets and liabilities to another railroad company and to become merged in said other company, an injunction was granted enjoining the transfer, at the suit of a stockholder of the first company, to be dissolved on the giving to said stockholder of security for the payment of the value of his stock.[10]

The trustees or directors of a corporation, by the consent of a mere majority of the corporators, cannot transfer all the corporation property and the execution of all corporate trusts to third persons, selected by them, contrary to the wishes of a minority capable and willing to execute them.[11]

A stockholder may not employ an attorney to appear for his corporation.[12]

532. Power to Bring Suit Against the Corporation and Against Others in the Name of the Corporation.[13]

533. Limit of Liability of Officers and Stockholders of Corporations Formed Under or Accepting the Act of April 29, 1874.

The officers and stockholders of corporations organized under or accepting the provisions of this act shall not be individually liable for the debts of said corporation otherwise than in this [act] provided.[14]

534. Liability of Stockholders for Work or Labor Done.

The stockholders in each of said corporations shall be liable, in their individual capacity, to the amount of stock held by each of them, for all work or labor done to carry on the operations of each of said corporations; but this section shall not be construed to increase or diminish the liability of stockholders in corporations which, by the terms of this statute, are to be governed, controlled and managed by the provisions of other statutes, but their liability shall be fixed and defined by the terms of the statutes by which said corporations are to be governed, controlled and managed.[15]

(10) Lauman *v.* Lebanon Valley R. Co., 30 Pa., 42 (1858).
(11) Langolf et al. *v.* Seiberlitch et al., 2 Parsons, 64 (1851).
(12) Brown *v.* Mfg. Co., 1 Phila., 73 (1850).
(13) See Secs. 611, 614.
(14) Sec. 24, Act April 29, 1874, P. L., 83.
(15) Sec. 14, Act April 29, 1874, P. L., 80, as amended by Sec. 3, Act April 17, 1876, P. L., 32. The last sentence refers to the provisions of Sec. 39.

535. Actions to Enforce Liability.

In any action or bill in equity brought to enforce any liability under the provisions of this act, the plaintiff may include as defendants, any one or more of the stockholders of such corporation, claimed to be liable therefor; and if judgment be given in favor of the plaintiff for his claim, or any part thereof, and any one or more of the stockholders so made defendants, shall be found to be liable, judgment shall be given against him or them. The execution upon such judgment shall be first levied on the property of such corporation, if to be found in the county where the chief business of the corporation is carried on, and in case such property, sufficient to satisfy the same cannot be found in said county, the deficiency, or so much thereof as the stockholder or stockholders, defendants, in such judgment, shall be liable to pay, shall be collected of the property of such stockholder or stockholders; on the payment of any judgment as aforesaid, or any part thereof, by one or more stockholders, the stockholder or stockholders so paying the same shall be entitled to have such judgment, or so much thereof as may have been paid by him or them, assigned to him or them for his or their benefit, with power to enforce the same in manner aforesaid, first against the company, and in case the amount so paid by him or them shall not be collected of the property of the corporation, then ratably against the other solvent stockholders, if any such there be, originally liable for the claim on which such judgment was obtained; but no stockholder shall be personally liable for payment of any debt contracted by any such corporation, unless suit for the collection of the same shall be brought against such stockholder or stockholders within six months after such debt shall have become due.[16]

536. Statutes of Limitation as Applicable to Claims Against Stockholders and Directors.

It is hereby declared to be the true intent and meaning of the statute of limitation that no suit at law or in equity shall be brought or maintained against any stockholder or director in any corporation or association to charge him with any claim for materials or moneys for which said corporation or associa-

(16) Sec. 15, Act April 29, 1874, P. L., 80. This is a re-enactment of Sec. 23, Act of April 7, 1849, P. L., 568, with a very few verbal changes.

tion could be sued, except within six years after the delivery of the materials or merchandise, or the lending to or deposit of money with said corporation or association, or the commission of such act of negligence by such stockholder or director.[17]

537. History of Legislation Relative to Personal Liability of Stockholders.

The method of enforcing the personal liability of stockholders for debts due by the corporation for labor done and materials furnished provided in the Act of April 29, 1874, being precisely the same as that provided by Sec. 23 of the Act of April 7, 1849, P. L., 568, decisions in cases arising under the Act of 1849 are, of course applicable to cases arising under the Act of 1874, so far as the method of enforcing the liability is concerned.

"By the 9th section of the Act of 1849, it is provided that stockholders in any company incorporated under that act shall be jointly and severally liable in their individual capacities for the debts of the company, to the extent of the amount remaining unpaid on the shares of stock held by them respectively. The supplement of April 20, 1853, extended this liability, as to all companies thereafter incorporated, to all the debts of the company without restriction. The further supplement of March 27, 1854, however, limited this general liability to 'debts due to miners, quarrymen and other laborers employed by such companies and for machinery, provisions, merchandise, country produce and materials furnished by said companies, respectively.'"[18]

Sec. 14 of the Act of April 29, 1874, practically followed the provisions of the Act of March 27, 1854, P. L., 215, in making stockholders personally liable for work or labor done or materials furnished, but Sec. 3 of the Act of April 17, 1876, P. L., 32, amending said Sec. 14 of the Act of 1874, struck out the words "or materials furnished," and left the liability only for work or labor done.

(17) Act of March 28, 1867, P. L., 48. This act applies to corporations other than those formed under or accepting the provisions of the Act of April 29, 1874, the statutory liability of stockholders in which is only for work and labor done, and only for six months after the debt becomes due, as appears in the preceding section.

(18) O'Reilly *v.* Bard, 105 Pa., 569 (1884).

538. Personal Liability Not a Direct Indebtedness.

The personal liability of a stockholder, as created by the charter of a corporation or by statute, is not in the nature of a direct indebtedness to the corporation or its creditors, but is rather a collateral liability which may or may not occur on the final disposition of the assets of the company; his liability is rather that of a guarantor than that of a surety. Shareholders and depositors in a corporation are, therefore, entitled, if their shares are paid up, to their proportion of the assets of the corporation, on the distribution of the same after an assignment, although the corporate assets may not pay all claims. In that event their liability arises.[19]

The provisions of Sec. 7 of the Act of April 29, 1874, as to the immunities and liabilities of a transferee of stock are not to be considered as imposing a special liability, but merely as fixing a status. Hence the liability of a transferee of stock to the corporation to pay up to the par value thereof, is not to be regarded as a special liability to be enforced for the benefit of creditors in the manner specified in Sec. 15 of said act.[20]

539. The Personal Liability Is Not the Sole Remedy of Creditors.

The personal liability imposed by Sec. 14, Act of April 29, 1874, is not the sole liability which creditors may enforce against stockholders. They may also enforce the liability for unpaid subscriptions to capital stock.[21] Where the principal debtor is a corporation which has become insolvent, and made an assignment for the benefit of creditors, the creditor is not bound, before having recourse to the guarantor, to enforce the individual liability of the stockholders of the corporation.[22]

540. Statutory Liability is Strictly Construed.

An act incorporating a company provided that "The stockholders of said company shall be jointly and severally liable in their individual capacity for debts due mechanics, workmen and laborers employed by said company, and for materials furnished

(19) Schlaudecker's Appeal, 22 W. N. C., 37 (1888). See Pattison & Co. *v.* Wyomissing Mfg. Co., 40 Pa., 117 (1861); Mean's Ap., 85 Pa., 79 (1877); Craig's Appeal, 92 Pa., 396; 8 W. N. C., 510 (1879).

(20) Bunn's Appeal. Lane's Appeal, 105 Pa., 49 (1884).

(21) Lane's Appeal. Bunn's Appeal, 105 Pa., 49 (1884).

(22) National Loan Society *v.* Lichtenwalner, 100 Pa., 100 (1883).

said company." Held, that such provisions are to be strictly construed—citing McMillan *v.* McCreary, 54 Pa., 230—as in derogation of the common law, and that this particular provision did not apply to hauling, repairing wagons, lumber for erecting machinery, provender for horses used by the company, powder for blasting, tools, etc. "Materials furnished" has reference only to such materials as form part or portions of the products of the establishment.[23]

541. How Stockholders May Compel Contribution From Other Stockholders.

A stockholder paying a judgment recovered under the Act of 1874 can recover only in the manner provided in the act, viz.: by taking an assignment of the judgment and enforcing execution against other stockholders who were parties defendant in said judgment. He cannot maintain an action of assumpsit against other stockholders who were not parties to said judgment.[24]

The 23d section of the Act of April 7, 1849, providing that stockholders may have any judgment which they are required to pay assigned to them, does not contemplate the collection of a judgment from less than the whole number of defendants while the suit is pending as to the others. "Sterrett *v.* Ramsay, 2 Watts, 91, decided that in the case of an appeal by one of two defendants against whom an award was made, a fi. fa. shall not issue against the defendant who did not appeal, until the termination of the appeal by the other defendant."[25]

Where certain stockholders of a corporation organized under the Act of 1849 were sued together with the company, and a judgment was obtained by which they were compelled to pay, the right to enforce contribution from the other stockholders is exclusively under the provisions of the statute, and not in equity.[26]

542. Liability Can be Enforced Only as Provided in the Statute.

The individual liability of stockholders can be enforced only as

(23) Moyer *v.* Penna. Slate Co., 71 Pa., 293 (1872); McMullin *v.* McCreary, 54 Pa., 230 (1867); Mean's Appeal, 85 Pa., 75 (1877).

(24) O'Reilly *v.* Bard, 105 Pa., 569 (1884).

(25) Hine *v.* Reading Industrial Mfg. Co., 2 Woodward's Decisions, 151 (1864).

(26) Brinham et al. *v.* Wellersburg Coal Co., et al., 47 Pa., 43 (1864).

provided in the statute.[27] It cannot be enforced by a rule against the officers and stockholders of a corporation to show cause why judgment should not be entered against them.[28]

A bill in equity was filed by creditors of a corporation organized under the Act of April 7, 1849, against stockholders in the company to render them personally liable for the debts of the company on the ground that the capital stock was not actually paid in as stated in the certificate filed in the office of the Secretary of the Commonwealth. The court said: "We are of the opinion that the plaintiffs in this bill have an adequate and complete remedy at law, specially provided by the act to encourage manufacturing corporations in this Commonwealth, passed April 7, 1849. This mode of making individual stockholders liable is particularly prescribed by this act, and must be through the medium . . . . therein pointed out."[29]

543. The Corporation Must be Joined as Defendant.

Under the Act of 1849 and its supplements stockholders may not be sued alone. They must be joined with the corporation, even when a judgment has been recovered in an action against the corporation alone, in the same cause of action.[30]

544. Proof That Persons are Stockholders.

In an action to enforce the individual liability clauses of the General Manufacturing Company Act of April 7, 1849, and supplements, the charter of incorporation is *prima facie* evidence that all the persons named therein were, at the commencement, members of the corporation. And, under said act, a recovery may be had against such of the individual stockholders sued as are proven to be stockholders, though some are included against whom that fact is not proved.[31]

545. Miscellaneous Decisions Relative to Personal Liability.[32]

Where a body of stockholders sold all the property of their

(27) Youghiogheny Shaft Co. et al. *v.* Evans et al., 72 Pa., 331 (1872).

(28) Barber *v.* Standard Sewer Pipe Co., 5 Pa. C. C., 293 (1888).

(29) Patterson et al. *v.* Lane et al., 35 Pa., 275 (1860).

(30) Hoard et al. *v.* Wilcox et al., 47 Pa., 51 (1864); Patterson & Co. *v.* Wyomissing Mfg. Co., 40 Pa., 117 (1861).

(31) McHose & Co. *v.* Wheeler et al., 45 Pa., 32 (1863).

(32) As to statutory liability of resident stockholders in foreign corporations, see Sec. 734.

corporation to two of their number for a sum payable partly in cash and partly in stock, the court in a proceeding by creditors compelled all stockholders assenting thereto to contribute towards paying the unpaid claims of creditors. Though the purchaser would be liable for the full consideration in cash as to creditors, yet, as between themselves, the stockholders who sold their stock to the two purchasers of the property (by whom it was then transferred to the company in payment for the property) would be still liable to assessment after its transfer.[33]

A merchant, upon orders of a manufacturing company incorporated under Act of April 7, 1849, furnished provisions, etc., mentioned in the second section of the Act of March 27, 1854, P. L., 215, to the employes of the company, and, by arrangement, the company took up the orders monthly by giving their notes. Held, that this was within said second section, and that the stockholders were liable.[34]

The additional liability imposed by Secs. 14 and 15 of the Act of April 29, 1874, as amended by Sec. 3, Act of April 17, 1876, P. L., 30, in favor of mechanics and laborers, is purely statutory in character, and is not a debt "arising from contract, either express or implied," within the meaning of the Act of March 20, 1810, conferring jurisdiction upon justices of the peace.[35]

The right of action against individual stockholders for work or labor done for the corporation arises when the debt becomes due by the corporation, and when suit can be brought against the latter it can be brought, at the same time, against the former. The statute of limitations, therefore, begins to run in favor of the stockholder at the time the debt becomes due by the corporation, and if suit is not brought within six months from that time a claim against the stockholder is barred.[36]

Under a charter providing that the stockholders of a bank shall be individually responsible, equally and ratably, and not one for another, for all its debts to the extent of double the amount of stock subscribed for or held by them, a stockholder is liable directly to the creditors to the extent of double the par value of his

(33) Chambersburg M. & B. Assn.'s Appeal, 2 Walker, 488 (1874).
(34) Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa., 395 (1870).
(35) Katch *v.* Benton Coal Co., 19 Pa. Super. Ct., 476 (1902).
(36) Bower *v.* Cyano Chemical Co., 20 Pa. Super. Ct., 33 (1902).

stock, in addition to his liability to the corporation for any stock subscribed for and not paid for.[37]

Sec. 9, of the Act of April 7, 1849, makes the stockholders jointly and severally liable in their individual capacities, to the amount unpaid on their respective shares, for all debts of the company. Sec. 14 makes directors consenting to a dividend of more than the net earnings of a company liable for all the debts of the corporation contracted while they are in office or existing at the time of the dividend. Sec. 23 provides that, in any action brought to enforce any liability under this act, one or more stockholders may be included as defendants. Held, that the 23d section contemplates actions against the company and not against directors, as per Sec. 14. Directors must be sued singly or together, and not in conjunction with stockholders, and the directors are not entitled to subrogation.[38]

546. Assessments Upon Full-Paid Stock.

Sec. 12 of the Act of April 29, 1874, P. L., 79, provided "that every corporation may, from time to time, at a legal meeting called for the purpose, assess upon each share of stock such sums of money as the corporation may think proper, not exceeding in the whole the amount at which each share was originally limited; and such sums assessed shall be paid to the treasurer at such times and in such instalments as the corporation directs."

This provision conferred the power to make such assessment upon stock the full par value of which had been already paid by the subscriber. The liability to assessment thereby imposed was independent of, and beyond the liability to, assessment up to the par value.[39]

This provision was omitted from the amendments to Sec. 12 of the Act of April 29, 1874, of May 25, 1887, P. L., 273, and June 26, 1895, P. L., 369, and is no longer in force.

547. Liability of Stockholders on Subscriptions to Stock.[40]

(37) Dreisbach *v.* Price, 133 Pa., 560 (1890).

(38) Hill *v.* Frazier, 22 Pa., 320 (1853).

(39) Price's Appeal, 106 Pa., 421 (1884). Assessments under this provision were required to be made by the stockholders. Assessments made by the directors without authority from the stockholders were void. Lykens Valley Cream Co. *v.* Bonawitz, 1 Dauph. Co., 249 (1886).

(40) See Chapter 15, Subscriptions to Capital Stock and Sec. 269.

548. Personal Liability of Stockholders in Mining, Manufacturing, Mechanical, etc., Corporations.

If any part of the capital stock of a company is withdrawn and refunded to the stockholders, before the payment of all the debts of the company, contracted previously to the recording of a copy of the vote for that purpose in the office of the Recorder of Deeds, as prescribed in the preceding section, all the stockholders of the company shall be jointly and severally liable to the payment of such debts.[41]

The stockholders of any and all corporations under this act, shall be personally liable for all sums of money due to laborers, clerks and operatives, for services rendered within six months before demand made upon the corporation, and its neglect or refusal to make payment.[42]

The limitation of liability of stockholders for labor done imposed by Sec. 15 of the Act of April 29, 1874, to six months before suit brought against the stockholder, applies to the indebtedness mentioned in Sec. 14, and not to the liability of stockholders and directors of mining, mechanical, etc., corporations imposed by Sec. 39 of said act.[43]

Sec. 15 limits the time within which suit may be brought against the stockholder to six months after the debt becomes due. Sec. 39, Cl. 11, limits the services for which payment may be recovered from the stockholder to those rendered within six months before demand upon the corporation and its neglect or refusal to pay.

549. Personal Liability of Stockholders in Iron and Steel Companies.

The stockholders of every company incorporated for the purposes named in this section shall only be individually liable for debts due to the laborers, mechanics, or clerks, for services, and in that case for no period exceeding six months.[44]

(41) Sec. 29, Clause 4, Act April 29, 1874, P. L., 101. Taken from Sec. 23, Act July 18, 1863.

(42) Sec. 39, Clause 11, Act April 29, 1874, P. L., 102. From Sec. 39, Act July 18, 1863.

(43) Green et al. *v.* Whitehead et al., No. 1, 5 D. R., 612 (1896).

(44) Sec. 38, Clause 8, Act April 29, 1874, P. L., 101.

550. Personal Liability of Stockholders in Banks.[44*]

. . . . The shareholders of any corporation formed under this act shall be individually responsible, equally and ratably, but not one for another, for all contracts, debts and engagements of such corporation to the amount of their stock therein in addition to the par value of such shares.[45]

The capital stock of any banking corporation, created by the laws of this Commonwealth, may be decreased from time to time, subject to the provisions of the Act of eleventh of June, one thousand eight hundred and seventy-nine, entitled "An act to provide for the manner of decreasing the capital stock of banking corporations: *Provided,* That such decrease of the capital stock of any such banking company shall not affect or destroy the liabilities of the stockholders for the indebtedness of such corporations, at the time of such decrease, where they are now liable under their charters, but that for all deposits received by banking corporations after such decrease, the stockholders shall only be liable for the indebtedness of such banking company as the charter provides." [46]

The provisions of the Act of April 16, 1850, P. L., 477, prescribing a special proceeding to enforce the personal liability of stockholders of banks, apply only to banks of issue; therefore a bill in equity can be maintained by an assignee for the benefit of creditors of a bank not of issue, to enforce a statutory liability imposed upon the stockholders. There are now no State banks of issue in existence.[47]

Upon the distribution of the assets of an insolvent bank, the dividends of stockholders owing on account of their stock will be appropriated to the necessary amount to the payment for such stock, but the personal liability of stockholders to depositors, under a local act of April 26, 1872—and presumably under Sec. 5 of the Act of May 13, 1876, P. L., 161, and Sec. 1 of the Act of May 11, 1874, P. L., 135—may not be set up to prevent paid-up stockholders from participating as creditors in the distribution.[48]

(44*) See Sec. 957.

(45) Sec. 5, Act May 13, 1876, P. L., 161.

(46) Sec. 1, Act June 22, 1883, P. L., 155.

(47) Dreisbach et al. *v.* Price, 133 Pa., 560 (1890).

(48) Humboldt Safe Dep. & T. Co.'s Assigned Estate, 3 Pa. C. C., 621 (1886).

551. Agreements Among Stockholders.[49]

A number of stockholders of an insolvent corporation agreed to contribute proportionately toward the payment of its indebtedness "whenever the solvent members of said association shall sign this stipulation." Owing to the failure to secure the signatures of all the solvent members thereto, the agreement was not carried out by the payment of money by those who had signed, whereupon suit was brought by the assignee for the benefit of creditors to recover from these signers the pro rata amounts named in the agreement. Held, that the agreement was not binding, not having been signed by all the solvent stockholders.[50]

An agreement among stockholders that the holders of a majority of the common stock may declare that a stockholder has ceased to be a desirable associate either on account of incompetency or personal conduct, and thereupon appraise and take his stock at its cash value, is a valid contract and binding upon all parties to it; and if such a majority after proper consideration and in good faith find that a given member has ceased to be a desirable associate, and have also in good faith appraised his stock, the majority may by a bill in equity enforce the specific performance of the agreement and compel a transfer of the member's stock at the appraisement fixed by the majority, without any addition for good will.[51]

(49) See Sec. 264.

(50) Brady *v.* Elliott et al., 181 Pa., 259 (1897); 40 W. N. C., 399. See Nellis *v.* Coleman, 11 W. N. C., 111 (1881).

(51) Boggs *v.* Boggs & Buhl, 217 Pa., 10 (1907).

CHAPTER XXIV.

INSOLVENT CORPORATIONS—RECEIVERS.

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575. Appeals from Decrees Disposing of Funds Raised by Judicial Sales.
576. Appointment of Receivers After Dissolution.
577. Appointment of Receivers After Decree of Ouster in a Proceeding by Quo Warranto.

552. Capital Stock a Trust Fund.[1]

Though the doctrine that the capital stock of a corporation is a trust fund for the payment of its debts has been doubted by the courts of other States and by the Supreme Court of the United States, that doctrine has never been questioned in Pennsylvania.[2]

The theory that the capital stock is a trust fund for the protection and benefit of creditors extends to the entire stock subscribed,

(1) See Sec. 239, Capital Stock.
(2) See Sec. 239.

and not merely to the percentage paid in,[3] but it is not a trust fund for the benefit of creditors of contractors who construct the plant of the corporation.[4]

Stockholders who diminish the trust fund by distribution among themselves, without first providing for the payment of all indebtedness, receive it impressed with a trust which a court of equity will enforce, but a shareholder who has not shared in the distribution is not liable. The trust is enforceable at the suit of a creditor whose claim was not liquidated nor even in suit at the time of the distribution. Although all the stockholders who have shared in the distribution impressed with the trust for creditors are liable to eventually contribute their proportion to the payment of the demand of the creditor, yet each stockholder is bound to restore his part *in toto,* and it is not necessary that all the stockholders be joined in the suit. A creditor is entitled to a decree against the stockholders sued for the full amount of the fund distributed among them.[5]

The assets of an insolvent corporation are a fund for the payment of its debts, and a court of equity will enforce this trust in favor of the creditors against the holders of such assets, and the Act of April 4, 1862, authorizing a contractor to issue a writ of scire facias on his judgment, and proceed as in other cases, does not give a remedy where a judicial sale has extinguished the corporation and rendered it impossible for him to obtain judgment against it.[6]

A water company contracted with a firm of contractors to construct the plant for the company, agreeing to deliver to the firm, as work progressed, certain stock and bonds of said company. The contractors borrowed money from a firm of bankers on their notes, with such stocks and bonds as collateral. Subsequently the contractors, the bankers and a firm of pipe manufacturers, creditors of the contractors, agreed that the bankers should advance to the pipe manufacturers certain money, and the latter

(3) Macungie Savings Bank *v.* Bastian, 10 W. N. C., 71 (1881); Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869); West Chester & P. R. Co. *v.* Thomas, 2 Phila., 344; Coit *v.* North Carolina Gold Amal. Co., 39 Leg. Int., 394 (1882); Lane's Appeal, 105 Pa., 49-60 (1884); and many other cases.

(4) McNeal Pipe & F. Co. *v.* Bullock & Co., 174 Pa., 93 (1896).

(5) Stang's Appeal, 10 W. N. C., 409 (1881).

(6) Shamokin Valley & Pottsville R. Co. *v.* Malone, 85 Pa., 25 (1877).

were to complete the plant. The securities were to remain with the bankers and the pipe manufacturers, to secure them in completing the contract. The contractors subsequently became insolvent, owing plaintiff for supplies furnished for the water plant. The plaintiff filed his bill against these parties and the water company, praying that the securities of the water company be declared a trust for the construction of the plant, and that plaintiff be decreed subrogation under the tripartite agreement, or that that agreement be declared fraudulent and void as to plaintiff. Held, (a) that the water company owed no duty to plaintiff because it owed him no debt; (b) that the tripartite agreement involved no actual or constructive fraud affecting the plaintiff's rights; (c) that the securities of the water company in the hands of the contractors or their transferees were not affected by any trust in favor of the plaintiff; (d) that the plaintiff had no equity which would entitle it to subrogation as a party to the tripartite agreement; (e) that said agreement involved an express appropriation by the contractors of certain of their assets to the payment of specific debts to particular creditors, and that this was not illegal because the law did not then forbid the preferment of creditors.[7]

553. Unpaid Subscriptions an Asset.[8]

Upon the insolvency of a corporation, its unpaid and uncalled capital stock constitutes a trust fund for the benefit of all its creditors, and will be administered as such.[9]

Only so much, however, of the unpaid capital as is necessary for the payment of debts can be called in, and this can only be done when the other assets are exhausted. Before a decree can be made for the payment of the capital stock, there must be an account taken of the amount of debts, assets, and unpaid capital stock of the corporation. The decree must be for the amount due by each stockholder.[10]

In an action to recover the unpaid subscriptions on stock, by an assignee for the benefit of creditors of an insolvent corporation,

(7) McNeal Pipe & Foundry Co. *v.* Bullock & Co., 174 Pa., 93 (1896).

(8) See Secs. 239 and 316.

(9) Lane's Appeal. Bunn's Appeal, 105 Pa., 49 (1884); Bank of Virginia *v.* Adams, 1 Pars., 534 (1850).

10) Bell's Appeal, 115 Pa., 89 (1886); Dunn et al. *v.* Phila. & Susq. Blue Stone Co., 13 W. N. C., 57 (1883).

there can be no recovery unless (a) an assessment has first been made, or (b) the jury find from the evidence that the whole of the unpaid subscriptions is necessary to pay the creditors of the corporation. In Lane's Appeal, supra, and Bell's Appeal, 115 Pa., 89 (1886) it was necessary to have an accounting and assessment to find out how much of the unpaid subscriptions would be necessary to be paid, but this is not necessary where the jury find that the whole of such subscription is necessary.[11]

"Thus, in Cornell's App., 114 Pa., 153, a bill by judgment creditors of a corporation against certain stockholders on their unpaid subscriptions was sustained on the averments of insolvency of the corporation, and the exhaustion of the plaintiff's remedies at law, though no account had been taken of the whole liabilities of the corporation, and other stockholders were not made parties, Trunkey, J., saying 'The right of the complainant to immediate and entire relief is not to be delayed by any questions of expediency, or of the ultimate rights of the defendants to contribution.' A similar bill was sustained in Bell's App., 115 Pa., 88. In Citizens' & Miners' Savings Bank *v.* Gillespie, 115 Pa., 564, it was held that 'while ordinarily an account and assessment are necessary to fix the amount of the stockholder's liability on his unpaid subscription, yet the necessity for this does not exist where the whole amount is required to pay the debts . . . . the assignee may sue at once for all that is required.' In Hatch *v.* Dana, 101 U. S., 205, a creditor's bill against a single stockholder was sustained, although no call had been made by the corporation, no account taken of the corporation's other indebtedness and the other stockholders were not made parties." [12]

An assignee of an insolvent corporation may maintain a bill in equity to recover unpaid subscriptions to the capital stock from a large number of its stockholders, although no accounting is asked for and the bill shows that all of the unpaid subscriptions are necessary to pay the debts of the corporation.[12*]

Unpaid subscriptions to the capital stock of a corporation become insolvent, may be levied upon under writs of attachment exe-

(11) Yeager *v.* Scranton Trust Co. and S. Bank, 14 W. N. C., 296 (1884); Citizens' & Miners' Savings B. & T. Co. *v.* Gillespie, 115 Pa., 564 (1887); Kennedy *v.* Gillespie, 3 C. P. Rep., 131 (1886); German Ins. Co. *v.* Strahl, 13 Phila., 512 (1878).

(12) Swearingen *v.* Sewickley Dairy Co., 198 Pa., 68 (1901).

(12*) Cook *v.* Carpenter (No. 1). Lipper's Appeal, 212 Pa., 165 (1905).

cution, although no assessment has been made by the board of directors. Where the articles of association of a corporation provided for a capital stock of $140,000, and stipulated that the stockholders should give their notes, without interest, for their respective subscriptions, which should not be liable at any time to an assessment of more than fifty per cent. of their face, held, that in case of insolvency, the whole capital stock was liable to creditors, and stockholders were liable to attaching creditors for the portion of their subscription not paid. The corporation having been declared bankrupt upon proceedings instituted subsequently to the service upon stockholders of such writs of attachment execution, and the unpaid capital having been awarded to the assignee, without prejudice to the rights of attaching creditors, and with leave to them to intervene, held, upon the intervention of such creditors claiming the amounts of their judgments out of the fund in the hands of the assignee, that the same was liable to the lien of the attachments, and should be awarded to the attaching creditors.[13]

Although, when a right of action lies exclusively in a corporation, creditors cannot file a bill to enforce the right until after a demand upon and a refusal by the corporation to proceed, yet where the very wrong complained of is one perpetrated by the managers of the corporation, a creditor's suit may be immediately brought. This right of the creditor is not taken away or postponed by the existence of a voluntary assignment for the benefit of creditors by the corporation. Creditors filed a bill against the directors of an insolvent bank. The assignee thereof subsequently brought an action against the directors for the same cause in the name of the bank. Held, that as the parties were substantially the same, each case being against the same defendants and brought by or for the corporation for the benefit of creditors, the pending bill was well pleaded in abatement in the action at law.[14]

(13) In re Glen Iron Works (U. S. Cir. Ct.), 14 W. N. C., 514 (1884); 13 W. N. C., 387 (1883). This case does not follow Bunn's Appeal which held that unpaid and uncalled amounts due upon capital stock, in the case of the insolvency of a corporation, cannot be attached by a judgment creditor of the corporation, by means of an attachment execution. Upon insolvency the unpaid and uncalled subscriptions were held to constitute a trust fund, which would be administered for the benefit of all the creditors.

(14) Penn Bank to use of Warner *v.* Hopkins, 111 Pa., 329 (1885).

A bill in equity for an accounting and to compel payment of unpaid subscriptions to capital stock by the receiver of a corporation against persons who are owners of, but not the original subscribers to, certain full-paid shares of stock of the company, which alleges that the stock was fraudulently issued, and that it is not full paid, is demurrable, if there be no allegation in the bill that the defendants are not holders for value with notice of the fraud alleged in the bill.[15]

Where a corporation has made an assignment for the benefit of its creditors, and the assignees have notified a stockholder to pay the unpaid subscription due on his stock, the action of the assignees is equivalent to a formal assessment by the officers of the corporation, and the assignees may recover the amount of such unpaid subscription in an action of assumpsit brought by the corporation to their use.[16]

The board of directors of an insolvent bank having duly made an assessment on unpaid stock subscriptions, for the purpose of meeting the liabilities of the bank, a depositor cannot set off the amount due him on account of his deposit, against the amount of assessment due by him on account of unpaid stock subscriptions.[17]

The liability of one as owner of stock in a corporation is not discharged by an ex parte transfer in writing, not entered upon the books of the corporation, with a private agreement of the transferee that the transferer shall not be liable for the payment of the same.[18]

A judge at chambers, during vacation, may make an assessment or order authorizing the assignee, for the benefit of creditors of an insolvent corporation, to collect the unpaid subscriptions on stock, as it is an exercise of chancery power, and the chancery side of the court is always open.[19]

The provisions of Sec. 7, of the Act of April 29, 1874, as to the immunities and liabilities of a transferee of stock, are not to be considered as imposing a special liability, but merely as fix-

(15) Finletter *v.* Appleton, 195 Pa., 349 (1900).

(16) Yeager *v.* Scranton Trust Co. & Sav. Bank, 14 W. N. C., 296 (1884).

(17) Macungie Savings Bank *v.* Bastian, 10 W. N. C., 71 (1881).

(18) Bell's Appeal, 115 Pa., 89 (1886).

(19) Citizens' & Miners' Sav. Bank & T. Co. *v.* Gillespie, 115 Pa., 564 (1887).

ing a status. Hence the liability of a transferee of stock to the corporation to pay up to the par value thereof is not to be considered as a special liability to be enforced for the benefit of creditors in the manner specified in Sec. 15 of said act.[20]

A subscriber to the stock of an insolvent corporation may not set off indebtedness of the corporation to him, when sued by the receiver or assignee thereof for the amount due upon his subscription.[21] He must pay the full amount of his unpaid subscription, and then, as a depositor, he has the same rights as other creditors.[21*]

Unpaid instalments of subscriptions to capital stock pass to an assignee for the benefit of creditors, under a deed of assignment which transfers all claims and demands.[22]

Defects in the incorporation of corporations may not be set up as defenses by subscribers in actions against them for the amounts due on their subscriptions.[23]

A judgment entered against B, a stockholder, by the receiver of a corporation, on a bond given by B to the corporation to secure the payment of his stock subscription, will not be opened because of an alleged understanding between B and the officers of the corporation that no judgment was to be entered upon the bond, that other security given before the execution of the bond was to be looked for, for the payment of the subscription, and that the bond was given solely to satisfy the insurance commissioner.[24]

554. Attachment Execution Against Unpaid Subscriptions.

"If the corporation is solvent and the subscription is in the ordinary form of an absolute engagement to pay the price of the stock, there is no doubt that an attachment in execution is an

(20) Bunn's Appeal, Lane's Appeal, 105 Pa., 49 (1884). See In re Glen Iron Works, U. S. Cir. Ct., 14 W. N. C., 514 (1884), where these cases were not followed.

(21) Allison *v.* Mountain City Banking Co., 1 Sch. L. Rec., 111 (1877); 1 Chest. Co., 264; Macungie Savings Bank *v.* Bastian, 10 W. N. C., 71 (1881).

(21*) Cook & Earle *v.* Carpenter et al., 12 D. R., 483 (1903).

(22) West Chester & Phila. R. Co. *v.* Thomas, 2 Phila., 344 (1858).

(23) Hamilton *v.* Clarion etc. R. Co., 144 Pa., 34 (1891); German Ins. Co. *v.* Strahl, 13 Phila., 512 (1878).

(24) German Ins. Co. *v.* Strahl, 13 Phila., 512 (1878).

effective remedy for a judgment creditor of the corporation. . . . . Now, it is manifest upon the plainest principles, that in the case of an insolvent corporation, all of whose assets are exhausted except its unpaid capital stock, there can be no recovery against a delinquent stockholder, until a call or assessment has been made upon him, fixing the amount he is required to pay. . . . . When insolvency and exhaustion exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund, which does not belong to the corporation, but to the whole body of its creditors. . . . . Before any recovery can be had in such proceedings . . . . . there must be an assessment made by competent authority. The necessity for an assessment arises from the consideration that only as much of the unpaid capital can be called in as is required for the payment of the unsatisfied debt." [25]

A subscription to the stock of a corporation is subject to attachment execution at the suit of a judgment creditor of the corporation. In such case, if there be a lien on the stock, or a liability of the stock to others, it must be specifically set up as a defense.[26]

555. The Bondholders and Stockholders of a Railroad Company May Unite for the Purchase of its Property.

The bondholders and stockholders of a railroad company may unite for the purchase of the property, at a sale made in good faith, to prevent a sacrifice thereof.

At a sale of the franchises and property of an insolvent railroad company, the same was bought under a preceding agreement setting forth that the parties thereto should unite to buy in the property, and for that purpose should divide themselves into three classes—bondholders, stockholders and creditors. The bondholders were to receive bonds, dollar for dollar; the stockholders stock, share for share, and the creditors consenting to sign were to receive deferred income bonds at par for the amount of their debts. Stockholders and creditors were to pay into the common treasury a sufficient amount to defray expenses of foreclosure, sale and reorganization. All the stockholders, all

(25) Lane's Appeal. Bunn's Appeal, 105 Pa., 49 (1884).
(26) Peterson *v.* Sinclair, 4 W. N. C., 97 (1877).

but a few of the bondholders, and all of its creditors, but the complainant, signed the agreement, which was carried out and a new company organized. A certain judgment creditor, of the old company, who had not become a party to the agreement, thereupon filed a bill against the new company, praying that it be decreed to pay him the amount of his judgment. Held, that the agreement was neither fraudulent nor illegal, nor sufficient to render the sale, otherwise conceded to be a valid discharge of complainant's claim, a fraud as to complainant, or to establish a constructive trust on the part of the new corporation for the discharge of the liabilities of the old.[27]

556. Preferred Creditors of Insolvent Corporations.[28]

Where no disability to make a preference of one creditor before another is imposed upon a foreign corporation by its charter, the prohibition of such a preference by a general enactment of the State where the corporation is chartered can have no extra-territorial effect.[29]

When the officers of a corporation in order to secure from a bank an extension of a loan, give the bank a paper to the effect that the bank "will be preferred always should anything ever happen," the bank will not be entitled to claim a fund arising from the assignment of the corporation for the benefit of its creditors, in preference to the individual claims of the officers.[29*]

A sale under a judgment confessed by an insolvent corporation will not be restrained by a court of equity on the ground that a sale of the company's property can be more advantageously conducted in the interest of all the creditors by receivers. Until the rights of the other creditors are violated no one has standing to challenge the execution creditor's right to use the means provided by law for the enforcement of his claim.[30]

Where a corporation incorporated under the Act of April 29, 1874, becomes insolvent, a bill in equity will lie at the instance

(27) Penna. Transportation Co.'s Appeal, 101 Pa., 576 (1882).

(28) See Secs. 415, 416.

(29) Keystone Watch Case Co. *v.* Phila. Optical & W. Co., 34 W. N. C., 216 (1894).

(29*) Kittanning Elec. Lt., Ht. & Pr. Co.'s Assigned Estate, 210 Pa., 6 (1904).

(30) Keystone Watch Case Co. *v.* Phila. Optical & W. Co., 34 W. N. C., 216 (1894).

of judgment creditors of said corporation to collect such part of the unpaid and uncalled subscriptions to the capital stock as is necessary for the satisfaction of its debts.[31]

The personal liability to creditors for work or labor done, furnished by Sec. 14 of the Act of April 29, 1874, imposed upon the stockholders of corporations chartered under the provisions of such act, is not the sole liability which such creditors may enforce for the satisfaction of their debts. They may also, by appropriate process, enforce for their benefit the liability existing on the part of the stockholders to the corporation to pay uncalled and unpaid subscriptions to capital stock.[32]

Where the judgment bond of a corporation is given to certain of its directors, as security to protect them on their endorsements for the company, and it was not made to appear that the company was insolvent at that time, or that, at the time there was any collusion or actual fraudulent intent, the entry of judgment on the bond, after the insolvency of the company, will not warrant an injunction to restrain the sale or attachment of corporate property upon an execution thereof.[33]

An insolvent corporation being indebted to its officers and directors, they executed the notes of the corporation in their own favor, and having obtained judgment by default, issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation, held, that this conduct of the officers was a fraud in law, which gave them no preference over general creditors in the distribution. Under Sec. 1, Act of April 7, 1870, no preference is given to execution creditors in the sale of the proper personal property of an insolvent corporation, but distribution must be made as in cases of insolvency.[34]

557. Act of June 4, 1901, P. L., 404, Forbidding the Preferring of Creditors.[35]

558. Assignments and Assignees.[36]

Corporations, unless forbidden by their charters or by statute,

(31) Bunn's Appeal. Lane's Appeal, 105 Pa., 49 (1884).
(32) Bunn's Appeal. Lane's Appeal, 105 Pa., 49 (1884).
(33) Neal's Appeal, 129 Pa., 64 (1889).
(34) McKee et al *v.* McKee's Rocks Oil Co., 13 Pa. C. C., 375 (1892).
(35) See Sec. 416.
(36) See Secs. 408, 410.

may make assignments for the benefit of creditors.[37] Foreign corporations may make assignments of their property in Pennsylvania, for the benefit of creditors, though the laws of their respective domiciles forbid the making of such assignments.[38]

The power of a corporate officer to make an assignment for the benefit of creditors cannot be challenged by a mere creditor, but only by a stockholder. Such an assignment is presumed to have been executed by authority of the corporation until the contrary is shown.[39]

The equity powers conferred on the courts by the Act of June 13, 1836, extend to the removal of the assignee of an insolvent corporation. An officer of an insolvent corporation who has been intimately connected with the management alleged to be fraudulent is not a proper person for assignee and will be replaced by a receiver.[40]

An assignee for creditors of an insolvent corporation will not be surcharged with the amount of unpaid stock subscriptions which he did not collect and which became barred by the statute of limitations, where it appears that he used ordinary care, prudence and diligence in his management of the estate, and had taken the opinion of counsel as to the stock subscriptions, and had been advised that if he had any right to sue on behalf of the company, which was at least doubtful, it could not be exercised until all the other assets had been exhausted, and it also appears that none of the creditors called upon him to do anything in reference to unpaid subscriptions.[41]

559. Distribution of Assets of Insolvent Corporations.

Holders of stock in an insolvent corporation who are creditors thereof may, when their subscriptions are fully paid, share

(37) Dana *v.* Bank of the U. S., 5 W. & S., 223 (1843).

(38) Zucker *v.* Froment, 5 D. R., 579 (1896); Benevolent Order of Active Workers *v.* Sanders, 28 W. N. C., 321 (1891); Borton *v.* Brines-Chase Co., 175 Pa., 209 (1896).

(39) Zucker *v.* Froment, 5 D. R., 579 (1896), citing Balliett *v.* Brown, 103 Pa., 546, 554.

(40) Failey, Receiver *v.* Stockwell, Assignee, 12 Pa. C. C., 403 (1892).

(41) Sewickley Dairy Company's Assigned Estate, 198 Pa., 63 (1901).

in the distribution of the assets of their corporations ratably with other creditors.[42]

In the distribution of the assets of an insolvent corporation, where there is no evidence impeaching the full consideration of notice given by the company to stockholders who advanced money to it, such stockholders are entitled to share with other creditors in the fund. Notes so given, which have been constantly recognized as subsisting obligations of the company, are not barred by the statute of limitations.[42*]

Subscribers who have received damages for failure to allot stock to them have the same status in the distribution of assets as other creditors.[43]

Officers of corporations, who are *bona fide* creditors of their respective corporations, may share in the distribution of assets,[44] even when they have purchased claims against the corporation after the assignment thereof for the benefit of creditors.[45]

The owners of the entire stock of a trust company chartered with special privileges prior to 1874 transferred such stock to other parties who changed the name of the company. At the time of the transfer the entire assets were assigned to a trustee who afterwards assigned them to a new trust company organized under the Act of April 29, 1874, and its supplements. Held, that the holder of a certificate of deposit issued by the old company, prior to the transfer of its stock and assets, cannot claim to share in the distribution of the property of the new company, after insolvency, where it appears that the transfer was not made for the purpose of defrauding creditors, and that the old company continued to exist under another name and was financially responsible.[45*]

A subscribed to the stock of a railroad company and contracted with the company to collect subscriptions from other subscribers

(42) Hogg's Appeal, 88 Pa., 195 (1878); Criswell's Appeal, 100 Pa., 488 (1882); Schlaudecker's Appeal, 22 W. N. C., 37 (1888).

(42*) Hooven Merc. Co. *v.* Evans Mining Co., 193 Pa., 28 (1899).

(43) Reading Iron Works' Estate, 149 Pa., 182 (1892).

(44) Trevose Model Brick Mfg. Co.'s Estate, 159 Pa., 496 (1894); Inland Insurance Co.'s Estate, 9 Lanc. Bar., 119 (1877); Atkinson's Appeal, 11 Atl., 239 (1887); Hill *v.* Standard Tel. Mfg. Co., 209 Pa., 231 (1904).

(45) Hammond's Appeal, 123 Pa., 503 (1889).

(45*) Advance Beneficial Order *v.* Penn Safe D. & T. Co., 195 Pa., 602 (1900).

and build a part of the company's road with the money so collected. The company agreed to give him either stock or transportation notes for the work done. The company became insolvent before the road was completed, and its property was sold at judicial sale. On the distribution of the proceeds of the sale, A claimed as a creditor for the work done. The claim was disallowed and a decree dismissing exceptions to the auditor's report was affirmed.[46]

The claim of a director of an insolvent loan association for money advanced to the association wherewith to pay a dividend fraudulently declared, will not be allowed.[47]

The transferee of the mortgage bonds of an insolvent corporation, originally issued to the president of the corporation in consideration of a preceding debt due him by the corporation, the mortgage securing which was issued at the instance of said president, who knew that the company was then insolvent, has no preference over the general creditors in the distribution of the fund arising from the sale of the mortgaged property.[48]

Creditors should be paid from the assets of insolvent corporations *pro rata,* and not according to priority of time in being admitted as parties to a suit to compel payment of subscriptions to the stock of the insolvent company.[49]

There is no relation between the creditors of a corporation and its directors of which the law can take cognizance, and the right of a creditor to have assets restored or compensation made for losses by directors is a purely equitable one which must be worked out mediately through the rights of the corporation. Hence, if the corporation and its stockholders choose to relinquish or waive that right, one who became a creditor years afterward may not insist upon them.[49*]

560. Appointment of Receivers.

The effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property, but at the same time the right to the propery is in no way affected by such

(46) Hart's Appeal, 96 Pa., 355 (1880).
(47) Kisterbock's Appeal, 51 Pa., 483 (1866).
(48) Sicardi *v.* Keystone Oil Co., 149 Pa., 148 (1892).
(49) Johnson *v.* Markle Paper Co., 153 Pa., 189 (1893).
(49*) Mechanics' B. & S. Assn.'s Assigned Estate, 202 Pa., 589 (1902).

appointment and the receiver merely holds the property as a custodian for the benefit of him who may be ultimately entitled to it. Hence a decree of court appointing a receiver is not in any way violated by an election of officers, under its by-laws, to continue the corporate life of the association.[49**]

A receiver is not a common law officer, and no authority exists for his appointment in quo warranto proceedings, unless it can be found in express statutory provision.

Under the Act of April 4, 1872, P. L. 46, relating to dissolution of corporations, the regular and ordinary course of the administration of the assets is by the officers of the corporation as trustees, and the power to supersede this mode by the special appointment of a receiver is in the Supreme Court, without regard to the court which rendered the decree of ouster. Not determined whether this power is an exercise of original jurisdiction taken away by the Constitution of 1874.[50]

Even if the jurisdiction of the Supreme Court was taken away by the Constitution of 1874, a receiver could be appointed only by a Court of Common Pleas having jurisdiction of the persons of the officers or the property of the company.[51]

The Act of April 26, 1893, P. L., 26, authorizing the appointment of receivers where corporations have been dissolved by judgment of ouster, does not apply where the affairs of a corporation after judgment of ouster are, at the date of passage of the act, in course of adjudication by a competent court.[52]

The direction in the act that the receiver "shall be held to supersede an assignee of the corporation in possession" will not authorize the court appointing the receiver to make a summary order upon an assignee who is under the jurisdiction of another court. The receiver must go into that court for an account and order for the transfer of the property by the assignee.[53]

The proceeds of real estate held in fee by a corporation and sold at sheriff's sale for the payment of its debts are to be distributed among its lien creditors, according to priority of lien, and not *pro rata*: Sec. 72, Par. IV, Act June 13, 1836, P. L., 775;

(49**) Com. ex rel. *v.* Overholt, 23 Pa. Super. Ct., 198 (1903).
(50) Com. *v.* Order of Vesta, 156 Pa., 531 (1893).
(51) Com. *v.* Order of Vesta, 156 Pa., 531 (1893).
(52) Com. *v.* Order of Vesta, 156 Pa., 531 (1893).
(53) Com. *v.* Order of Vesta, 156 Pa., 531 (1893).

Sec. 2, Act of April 30, 1844, P. L., 532; Sec. 1, Act April 7, 1870, P. L., 58.[54]

The proceeds of the judicial sale of the property of a private corporation are governed by the same rules of distribution that apply to such a sale of the property of an individual.[55]

The proceeds arising from a sale upon an execution of that property of an insolvent corporation which is not essential to the exercise of its franchises, goes to the execution creditor, and is not to be distributed among any of the other creditors. Whether any of the franchises of a corporation could be sold on execution and the proceeds applied on that execution to the exclusion of the other creditors, not decided.[56]

A receiver will not be appointed on a stockholders' bill where the same purpose can be accomplished by a sheriff's sale.[57]

It is error to appoint a receiver when the corporation is not made a party to the bill.[58]

A prayer for a receiver is, in effect, a prayer for an injunction. "Indeed, the order for the receiver is itself an injunction—it directs the tenants to attorn and pay the rents to him (the receiver), giving him full authority to lease and manage the property." Schlects' Appeal, 60 Pa., 172. "The appointment of a receiver was a suspension of its (the company's) functions and authority over its property and effects, and was equivalent to an injunction to restrain its agents and officers from intermeddling with its property in any way." Gravenstine's Appeal, 49 Pa., 310. A bill, therefore, asking for the appointment of a receiver is not fatally defective because it does not ask for an injunction.[59]

Prior to the Act of April 26, 1893, P. L., 26, the Court of Common Pleas had no jurisdiction to appoint a receiver in quo

(54) First Nat. Bank *v.* N. Y. & Westmoreland Gas, etc. Co., 137 Pa., 601 (1890), distinguishing Hogg's Appeal, 88 Pa., 195, and Hopkin's Appeal, 90 Pa., 69. The cases cited seem to refer only to the distribution of proceeds of the sale of personal property.

(55) Reynolds *v.* Reynolds Lumber Co., 175 Pa., 437 (1896); Same Parties and Roy's Appeal, 169 Pa., 626 (1896).

(56) Fairmount Coal & Iron Co.'s Appeal, 14 W. N. C., 214 (1884).

(57) Bell et al. *v.* R. D. Wood & Co., 181 Pa., 175 (1897); Griffin *v.* Burden, 10 Montg. Co. Rep., 184.

(58) Bell et al. *v.* Wood & Co., 181 Pa., 175 (1897).

(59) Treat *v.* Pa. Mutual Life Ins. Co., 199 Pa., 326 (1901).

warranto proceedings against a corporation on motion of the Commonwealth.[60]

A decree of court appointing a receiver cannot be impeached in a collateral proceeding.[61]

The appointment of a receiver for the purpose of winding up the affairs of a corporation and distributing its assets among its creditors, implies a finding that the corporation is insolvent, and the absence of a formal finding by the court, prior to the time of the appointment of the receiver, will not vary the principle upon which distribution is made, when the insolvency actually existed at such time.[62]

Where certain directors of an insolvent corporation appropriate to themselves all its property, for which they surrendered their certificates of stock, a receiver will be appointed and the return of the property decreed.[63]

The appointment of a receiver on the ground of insolvency is conclusive as to the fact of insolvency, which may not be questioned by a debtor of the company sued by the receiver.[64]

A bill against a corporation and its stockholders, praying for a bill appointing a receiver to collect subscriptions to stock, is not demurrable upon the ground that it does not include as respondents all the subscribers to the stock,[65] nor will exceptions to a master's report in favor of a decree ordering stockholders to pay unpaid subscriptions, upon the ground that the bill praying for such decree was not filed on behalf of all the creditors, nor against all of the stockholders in arrears, be sustained.[66]

A receiver will be appointed on a stockholders' bill when it appears that the president and general manager of a corporation, owning a controlling interest in the stock, is guilty of gross mismanagement whereby valuable contracts were lost and the company threatened with bankruptcy.[67]

(60) Assigned Estate of Fraternal Guardians, 34 W. N. C., 218 (1894); Com. *v.* Order of Vesta, 156 Pa., 531 (1893).

(61) Line *v.* Carlisle Mfg. Co., 18 Pa. C. C., 370 (1896).

(62) Com. *v.* State Ins. Co, 25 Pa. C. C., 283 (1901); 10 D. R., 339.

(63) Dare *v.* Bennett-Bretz Piano Co., 30 Pa. C. C., 481 (1904).

(64) Eichman *v.* Hersker, 170 Pa., 402 (1895).

(65) Bailey *v.* Pittsburgh Coal R. Co., 139 Pa., 213 (1891).

(66) Cornell's & Michler's Appeal, 114 Pa., 153 (1886).

(67) Arnold *v.* Russell Car & Snow Plow Co., 31 Pa. C. C., 38 (1905).

561. Receivers Appointed by United States Courts.

Receivers appointed by United States courts may be sued in the State courts in respect to any transaction connected with the property in their hands, without previous leave of the appointing court. Act of Congress of March 3, 1887, Sec. 3, 23 Statutes at Large, 552. Service on the agents of the insolvent company within the State is service upon the receivers.[68]

Prior to the Act of Congress of March 3, 1887, suit could not be instituted against the receiver of a corporation of a Federal court without first obtaining leave of the court. Under that act, however, as amended in 1888, such a receiver may be sued in respect to any act or transaction of his, in carrying on the business connected with the property, without the previous leave of the court which appointed him. Where a judgment has been obtained in a State court against such a receiver, and execution has issued on the judgment, an appeal from an order of the State court refusing to stay the judgment will be dismissed when it appears that before appeal taken the receiver obtained a restraining order from the Federal court enjoining the plaintiff from proceeding on the judgment.[69]

Where a foreign corporation has been placed in the hands of a receiver by decree of a United States court, a summons issued out of a State court and served on the agent designated by the corporation under the laws of Pennsylvania, as the agent on whom process might be served, on a cause of action arising after the appointment of the receiver, will be set aside. It seems that no action can be maintained against a receiver of a railroad company without leave being first granted upon application to the court appointing the receiver.[70]

562. Receivers Appointed by Courts of Other States.

Where a receiver appointed by a court of another State has once obtained rightful possession of personal property in Pennsylvania, the courts of this State will recognize the possession of the receiver on the ground of comity. An agent in this State, employed by a receiver of a foreign corporation, appointed by a court of another State, cannot proceed against the receivers by a

(68) Hill *v.* Receivers of the B. & O. R. Co., 7 D. R., 473 (1897).

(69) Davis Coal & Coke Co. *v.* Hess, 30 Pa. Super. Ct., 193 (1906); Krout *v.* Phila. & Easton Ry. Co., 16 D. R., 479 (1906).

(70) Anderson *v.* Buf., N. Y. & Phila. R. Co., 2 Pa. C. C., 402 (1886).

writ of foreign attachment to recover a claim.[71] But the appointment of a receiver of a foreign corporation by a court of the State of its domicile does not defeat foreign attachments issued in Pennsylvania by Pennsylvania creditors after the appointment of a receiver,[72] and until the assets of an insolvent corporation have been taken possession of by a court of the corporation's domicile, they being still within Pennsylvania, such foreign receiver is not, by virtue of his appointment, in a position to assert control over the same, nor exercise any authority over them as against domestic creditors.[73]

Where a receiver has been appointed by the courts of another State, the courts of Pennsylvania, on the ground of the comity existing between States, will recognize his appointment, provided his claims thereunder do not come in conflict with the rights of citizens of Pennsylvania. Where a receiver has been appointed by a court of competent jurisdiction of another State, a creditor who resides in that State and is bound by the decree of the court appointing the receiver, cannot, in an attachment execution, recover assets of the corporation in Pennsylvania claimed by the receiver.[74]

Where a receiver has been appointed for a foreign corporation in Pennsylvania, the assets of such company will, after the payment of domestic creditors, be awarded to the receiver appointed in the State of the company's domicile, in order that all the assets may be distributed to the stockholders by the latter receiver, after the payment of all creditors.[75]

563. Receivers of Foreign Corporations Appointed by Pennsylvania Courts.

When all the stockholders, officers and promoters of a foreign corporation, except one director, are citizens of Pennsylvania, and its assets are in the possession of its officers, a Pennsylvania court has jurisdiction to take and preserve the assets of the company which the officers are fraudulently using.[76]

(71) Lett *v.* Kirkpatrick, Receiver, 15 Pa. C. C., 212 (1894).
(72) Solis, Receiver, *v.* Blank, 199 Pa., 600 (1901).
(73) Frowert *v.* Blank, 205 Pa., 299 (1903).
(74) Bagby et al. *v.* Atlantic, Miss. & O. R. Co., 86 Pa., 291 (1878).
(75) Kean *v.* Supreme Sitting of Order of Iron Hall, 15 Pa. C. C., 194 (1894).
(76) Schmidt *v.* Metallic Condense Co., 27 Pa. C. C., 615, 618 (1902).

564. Receiver's Certificates.

Where it is for the interest of the bondholders and creditors of a street railway company, the court will order the issue of receiver's certificates to enable the receiver to place the roadbed and equipment of the company in good condition, and will order that the expenditures be made and the conduct of the business of the company be entrusted to a competent superintendent.[77]

One who lends money to a receiver upon his certificates is not bound to ascertain the purpose for which they are issued, or to see to the application of the money, or to consider the contents of the petition upon which leave was given to issue them. The authority is derived solely from the decree, and therefore, although it may differ in form from that which was prayed for, or although the money may be diverted to a use not intended, the lender is still protected.[78]

The validity of a receiver's certificate is not affected by the fact that the general creditors were not notified of the application for their issue, or that the court was led erroneously to suppose that they acquiesced therein. No notice whatever being required to give the court jurisdiction, those who advance their money upon certificates issued in conformity with the decree are entitled to be paid according to its terms.[79]

Unless receiver's certificates are expressly given a priority by the decree of court authorizing the issue of the same, the holders of them have no preference over creditors whose claims were incurred by the receiver in managing the business of the corporation under the decree of court. And where such certificates are exchanged for certificates of an earlier issue, which were given a priority over other claims, the holders thereof lose the preference belonging to the first issue of certificates, under the decree of court.[80]

Holders of claims for material and labor furnished a railroad company, whose claims had accrued more than six months before the appointment of a receiver, have no status to object to the

(77) Bucks County Ry. Co.'s Receivership, 22 Pa. C. C., 170 (1899).

(78) Nat. Banking Assn. *v.* Amer. Bldg. Co., 44 Leg. Int., 58 (1887).

(79) Nat. Banking Assn. *v.* Amer. Ship Building Co., 44 Leg Int., 58 (1887); Neafie's Appeal, 22 W. N. C., 31 (1885).

(80) Lewis *v.* Linden Steel Co., 44 P. L. J., 395 (1897).

issue of receiver's certificates in payment of debts incurred within six months before the appointment of the receiver.[81]

Receiver's certificates will issue at the request of the president of a railroad company, and that of a large per cent. of the bondholders, the decree providing that the same shall be without prejudice to non-consenting bondholders.[82]

565. Liens Upon Property Held by a Receiver.

Liens upon property held by a receiver are not divested by virtue of a sale made by him. If the order of sale make no mention of such prior lien or of incumbrance of any kind, the sale passes the title in the property as it is in the receiver, subject to whatever incumbrance there may be upon it.[83]

"The jurisdiction to appoint receivers and to order sales by them of property and franchises resides in courts of equity and is conducted according to the principles of equity practice. . . . . It thus appears that the general practice in equity in cases of foreclosure is, that liens are not barred unless the holder has notice of the proceeding. This proposition is also true in cases of sales by receivers. . . . . In Pennsylvania, in all ordinary sales of real estate by force of judicial proceedings, all liens are divested except first mortgages, under the Acts of 1830 and 1867. . . . . It follows, hence, that the rules and practice which prevail in equity in this class of cases, are now the rules and practice which prevail in Pennsylvania, and under the decisions cited supra, the plaintiff's lien was not divested by the receiver's sale.[84]

Judgments recovered after the appointment of a receiver, whether entered by leave of court or not, are not liens on the receivership funds. "In a railroad receivership, however, the court will make orders creating equitable liens as to debts antedating (postdating) the receivership, which they will not make as to receiverships of private corporations . . . . but there is no public interest to be subserved by giving a preference lien to

(81) Rutherford *v.* Penna. Midland R. R. Co., 178 Pa., 38 (1896).

(82) Rutherford *v.* Penna. Midland R. R. Co., 178 Pa., 38 (1896). See Taylor *v.* Balto. & Lehigh R. Co., 7 York, 174.

(83) Fidelity T. & T. Co. *v.* Schenley Park & H. Ry. Co., 189 Pa., 363 (1899).

(84) Fidelity T. & T. Co. *v.* Schenley Park & H. Ry. Co., 189 Pa., 363 (1899).

creditors who have advanced money to keep on its feet an embarrassed manufacturing corporation." [85]

Where a corporation has been decreed insolvent and a receiver has taken possession of its property, the status of all the creditors is fixed as of the date of the appointment of the receiver, and judgments recovered after such appointment, whether entered by leave of court or not, are not liens on the receivership fund and are not entitled to any preference. Otherwise, sometimes, in cases of railroad and other public corporations, where the public are interested with stockholders and creditors.[86]

Only debts that exist when the property and assets of a corporation, declared by the court to be insolvent, pass into the hands of receivers to be converted into cash and distributed, can participate in the distribution.[87]

566. Suits by Receivers.

Before a controversy between a receiver and numerous separate debtors of a corporation can be joined in one equitable proceeding, there must be some common relation, interest or question, to serve as the basis for the joinder. In the absence of such relation, interest or question, the decree of a court of equity and the relief given by it, in one judicial proceeding, could not by any possibility prevail to prevent the multiplicity of suits which is the very object of its interference. A bill filed by a foreign receiver, appointed specially to enforce the additional liability of forty-seven local stockholders, which alleged that the liability of the defendants had been fixed at the full amount of their holdings, and that the decree of a Minnesota court to that effect was conclusive upon them, was held to be demurrable on the ground that there was an adequate remedy at law.[88]

Persons sued by receivers may not set up that the corporation was not properly incorporated [89] nor, where the receiver was appointed upon the ground of insolvency, may a person sued by

(85) Cowan et al. *v.* Penna. Plate Glass Co.; Appeal of the Exchange Bank, 184 Pa., 1 (1898).

(86) Cowan *v.* Pa. Plate Glass Co.; Appeal of Exchange Bank, 184 Pa., 1 (1898); Same Parties, 188 Pa., 542 (1898).

(87) Com. *v.* State Ins. Co., 25 Pa. C. C., 283 (1901).

(88) Hale, Receiver *v.* Allinson et al., U. S. Cir. Ct., 9 D. R., 408 (1900).

(89) Cap. City Mut. Fire Ins. Co. *v.* Boggs, 172 Pa., 91 (1895).

such receiver question the insolvency of the corporation at the time of such appointment.[90]

A bill in equity will lie by the receiver of a dissolved corporation against its officers and directors to recover moneys belonging to the corporation which they have wrongfully divided among themselves. It is no defense to such suit to set up that the corporation owed no debts or obligations. That question will arise upon the distribution of the recovered fund. It is proper to enter a joint decree against such defendants.[91]

Where stockholders show that the directors are about improperly to discontinue a suit in a foreign jurisdiction involving a large amount, a new suit for which sum will be barred by the statute of limitations, a court of equity will appoint a receiver of the corporation.[92]

Authority to the receiver of a mutual insurance company to assess members to an amount equal to all other assessments heretofore levied, does not warrant the receiver in including in assessments levied under such authority penalties for the failure to pay former assessments.[93] The necessity for such assessments and the purpose for which they are to be used may not be questioned by a member sued therefor by the receiver.[94]

Where a receiver is carrying on the business of the corporation under an order of court, he should bring suit on claims arising under his operation of the business of the company in his own name.[95]

The receiver of a corporation who asks for an accounting from its directors and the payment by them of an amount alleged to be due, less proper credits, has no standing to object because, in stating the account, the directors are given credit for moneys advanced by them to the corporation and for salaries due for services performed under an agreement with the corporation.[96]

(90) Eichman *v.* Hersker, 170 Pa., 402 (1895).

(91) McCarty's Appeal, 110 Pa., 379 (1885).

(92) Hazzard *v.* Credit Mobilier, 6 W. N. C., 417 (1879).

(93) Cap. City Mut. Fire Ins. Co. *v.* Boggs, 172 Pa., 91 (1895).

(94) McCarty's Appeal, 110 Pa., 379 (1885); Detra *v.* Hoffman, 5 Del., 321; Cap. City Mut. Ins. Co. *v.* Boggs, 172 Pa., 91 (1895).

(95) Phila. & R. Coal & Iron Co. *v.* Schada, 15 Phila., 285 (1881).

(96) Miller *v.* Doyle, 211 Pa., 59 (1905).

567. Insolvent Corporations May Not Buy Stock Issued by Them.

Insolvent corporations may not buy their own shares of stock to the detriment of creditors. "As the capital stock is a trust fund for the payment of its debts, the use of the fund in the purchase of shares, in itself is destructive of a security intended primarily for the creditors and a plain misappropriation of it."[97] But solvent corporations may buy shares of their own stock, when the transaction is not prohibited by statute and is made in good faith.[98]

568. When Property in the Hands of a Receiver May Not be Levied Against.

The property of a corporation in the hands of a receiver cannot be levied upon and taken in execution under a judgment against an agent or partner of the corporation on the ground that the corporation, by permitting the agent or partner to do business in his own name and to buy goods from the creditor without knowledge of the agency, was thereby estopped from claiming the goods. In such case it is the duty of the judgment creditor to apply to the court which appointed the receiver, and ask the discharge of the property out of custody, so that he may proceed against it.[99]

"Property in the hands of a receiver for the purposes of sale will be treated the same as if it were in the hands of the sheriff. If the receiver is proceeding with proper diligence to sell the property, his possession will not be disturbed by any other court. If, however, he is carrying on business with the property, he cannot delay other creditors who have a right to sue for and collect their claims against it. There is no exclusive jurisdiction over the defendant in any one court." The existence of a receiver is no defense to an action on a prior mortgage.[100]

A court of equity which has appointed a receiver of a corporation has jurisdiction to restrain a resident general creditor of the corporation from attaching debts due to the corporation in other

(97) Columbian Bank's Estate, 147 Pa., 422 (1892). See Chambersburg Woolen Co. *v.* Chambersburg Mfg. Assn., 2 Walker, 488.

(98) Dock *v.* Schlichter Jute Cordage Co., 167 Pa., 370 (1895).

(99) Thompson et al. *v.* McCleary et al., 159 Pa., 189 (1893); Longstreth *v.* Phila. & Reading R. Co., 11 W. N. C., 94 (1881); Robinson *v.* Atlantic & Great W. Ry. Co., 66 Pa., 160 (1870).

(100) Real Estate T. I. & T. Co. *v.* Mahoning Rolling Mill Co., 6 D. R., 409 (1897).

States, and from attaching goods of the corporation in other States.[1]

When the possession of the property of an insolvent corporation has once properly vested in the receiver, it accompanies him into other jurisdictions, and he cannot be deprived thereof by creditors of such corporation resident within such other jurisdiction.[2]

569. Charges of Trust Companies for Becoming Sureties of Receivers.

Any receiver, assignee, guardian, committee, trustee, executor or administrator, required by law or by the order of any court to give a bond as such, may include as a part of the lawful expense of executing his trust such reasonable sum paid a company, authorized under the laws of this State so to do, for becoming his surety on such bond as may be allowed by the court in which he is required to account, not exceeding however one per centum per annum on the amount of such bond.[3]

From and after the passage of this act, any receiver, assignee, guardian, committee, trustee, executor, or administrator, required by law, by the order of any court, or by the provisions of any assignment, deed, will, or other document, under or by the authority of which such receiver, assignee, guardian, committee, trustee, executor, or administrator is acting, to invest the funds within his control in mortgages or other securities, may include, as a part of the lawful expense of executing his trust, such reasonable sum paid a company, authorized under the laws of this State so to do, for guaranteeing the payment of the principal and interest of such mortgage or other securities, not exceeding one-half of one per centum per annum upon the principal of such mortgage or other securities.[4]

570. Where Receivers are Authorized to Operate Works.

Where receivers who are authorized to operate the works of a corporation "with materials now on hand," and such other ma-

(1) Line *v.* Carlisle Mfg. Co., 18 Pa. C. C., 370 (1896).

(2) Lett *v.* Kirkpatrick, 15 Pa. C. C., 212 (1894).

(3) Act of June 24th, 1895, P. L., 248. This act is constitutional, Clark's Estate, 195 Pa., 520 (1900), reversing same title, 10 Pa. Super. Ct., 423; 41 W. N. C., 277.

(4) Act May 28, 1907, P. L., 271.

terials as the court may authorize them to buy, sell the manufactured products and pay into court the proceeds of such sales over and above the cost of production, they have no authority to involve the plant of the company in debt, and when the plant is sold, the proceeds will go in payment of labor claims and not to pay debts incurred by the receivers, who are liable therefor.[5]

571. Rents on Real Estate in Possession of Receivers.

Where a receiver of a private corporation goes into possession of real estate leased by it, and subsequently sells goods upon the premises under an order of court, the landlord has a lien for rent accrued under the receivership on the fund raised by the sale. In such case, the fund should not be reduced by any part of the receiver's commission or counsel fee, but he may be charged with part of the cost of an audit, where such an audit was necessary.[6]

Where a receiver of a private corporation sublets leased property of the corporation, and collects rent, the landlord should, in equity, receive the entire amount so collected, but where the receiver mingles it with the general fund which he used in conducting the business, and the landlord takes no steps to have such money set apart in payment of rent, and it becomes impossible to identify it, the landlord will not be entitled to priority for such rental in the distribution of the fund raised by the receiver's sale of the property of the insolvent company.[7]

The rent due by an insolvent corporation constitutes a preferred claim, and where a corporation mortgaged its lease to its landlord to secure arrears of rent, and the property was afterwards sold at a receiver's sale, it was held, inasmuch as the property was subject to distress for the rent due, the creditors of the corporation were not injured by the execution of the mortgage.[8]

572. Where a Receiver Has Been Appointed Creditors May Not Proceed Against Stockholders.

A receiver represents not only the corporation for which he is

(5) Gillespie *v.* Blair Glass Co., 189 Pa., 50 (1899).

(6) Lane *v.* Washington Hotel Co. Gummey's Appeal, 190 Pa., 230 (1899).

(7) Lane *v.* Washington Hotel Co. Gummey's Appeal, 190 Pa., 230 (1899).

(8) Burr *v.* Rose Valley Mills, 174 Pa., 302 (1896).

appointed, but all its creditors, and, as to the latter, it is his duty to secure all the assets available for their payment. Where a receiver has been appointed for an insolvent corporation, whose stockholders are by statute made liable, individually, to a certain extent, for the debts of the corporation, a creditor of the corporation cannot bring and maintain an action against a stockholder to enforce the individual liability, for all right of action against the stockholder has passed to the receiver for the benefit of the creditors at large.[9]

573. Service of Summons on Receivers.

Where leave to sue the receivers of a corporation has been granted by the proper court, summons may be served upon them by the sheriff out of his bailiwick. Receivers of a corporation may be regarded as the principal officers under Sec, 42 of the Act of June 13, 1836; and a summons served upon the receiver, in the manner therein directed, is good service.[10]

574. Foreign Attachment.

Proceedings in foreign attachments against a foreign corporation will not be quashed merely because the foreign corporation is in the hands of a receiver, in the State of its incorporation.[11]

575. Appeals from Decrees Disposing of Funds Raised by Judicial Sales.

"It was clearly irregular for the receiver of defendant company and several of its general creditors to join in a single appeal from the decree disposing of the fund raised by the sheriff's sale. Separate and independent claimants upon a fund cannot prosecute a joint appeal from the decree distributing the same." [12]

576. Appointment of Receivers After Dissolution.[13]

577. Appointment of Receivers After Decree of Ouster in a Proceeding by Quo Warranto.[14]

(9) Cushing *v.* Perot, 175 Pa., 66 (1896).
(10) Wert *v.* Keim et al., 2 Pa. C. C., 405 (1886).
(11) Voght et al. *v.* Covenant B. & L. Assn., 21 Pa. C. C., 351 (1897).
(12) Reynolds *v.* Reynolds Lumber Co., 175 Pa., 437 (1896).
(13) See Sec. 511.
(14) See Sec. 512.

CHAPTER XXV.

SUITS BY AND AGAINST CORPORATIONS.

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578. Jurisdiction of Litigation Between Stockholders of Corporations, etc., Granted to Courts of Common Pleas.

The several Courts of Common Pleas of this Commonwealth having the power of a court of chancery, shall have jurisdiction of all litigation and disputes between stockholders and parties claiming to be stockholders, and between creditors and stockholders and creditors and the corporation, of all corporations within this State; and in the proceedings before the court in such case, the service of process upon the company shall be held and considered as service upon one of the principal defendants, as provided in the first section of the Act of April sixth, one thousand eight hundred and fifty-nine, relating to equity jurisdiction and proceedings.[1]

579. Existence of Corporations Admitted Unless Put in Issue.

In every suit or judicial proceeding, in this Commonwealth, to which a corporation is a party, the existence of such corporation shall be taken to be admitted, unless it is put in issue by the pleadings.[2]

(1) Act May 4, 1893, P. L., 29. The original jurisdiction of the Supreme Court over corporations is limited by Article 5, Sec. 3, of the Constitution, to cases of injunction where a corporation is a party defendant, thus taking away the jurisdiction conferred by Sec. 13, Act of June 16, 1836, Act of April 8, 1852, P. L., 291, and Act of April 11, 1862, P. L., 477. See Fargo et al. *v.* Oil Creek & A. R. Ry. Co., 81* Pa., 266 (1875); Hottenstine v. Clements, 3 Grant, 317 (1861).

(2) Act June 24, 1885, P. L., 149. See Monongahela Bridge Co. *v.* Pitts. & Birmingham Traction Co., 196 Pa., 25 (1900). The Pamphlet Laws are evidence of the special acts incorporating corporations contained in them, Gray *v.* Monon. Nav. Co., 2 W. & S., 156 (1841). Where it was sought to hold stockholders in an unincorporated bank liable as partners, the burden of proof was held to be on the plaintiff to prove that the bank was not incorporated, and not on the defendant to prove that it was. Hallstead *v.* Coleman, 143 Pa. 352 (1891); Gibbs' Estate, 157 Pa., 59 (1893).

The title of the act cited being "An Act relating to the practice in Courts of Common Pleas, where the defendant is a chartered corporation," the provisions of the act are confined to cases in which a corporation is a party defendant. When, therefore, a corporation is plaintiff and the defendant an individual, the plaintiff may be put to proof of incorporation.[2*]

580. Inquiry Into the Franchises of Corporations in Suits Where it is Alleged that the Exercise of the Same Interfere with the Private Rights of Individuals.[3]

581. Suits May be Brought Against Corporations.

Suits may be brought against corporations by their corporate names before any court or magistrate of competent jurisdiction by summons, which may be served on the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation: *Provided,* That no suit shall be sustained on any bank note or notes payable to the bearer or order on demand, unless demand shall have been first made for payment thereof at their banking house, office or treasury, and in case of non-payment, interest shall be recoverable on the same from the time of making such demand.[4]

582. Judgment for Failure to Enter Appearance.

If any corporation, summoned as aforesaid, shall not appear by their officer, agent or attorney, at the time mentioned in said summons, then or at any time afterwards, on proof of the service of the summons, by the oath or affirmation of the officer serving the same, judgment by default shall be rendered against said corporation, for the sum which, to the court or magistrate shall appear to be due.[5]

583. Proceedings in Which a Corporation is a Party.

In cases in which a corporation shall be a party in any suit in any court or before any magistrate, all the proceedings, except

(2*) Empire Mfg. Co. *v.* Hench & Dromgold, 15 D. R., 659 (1906). As to the method of pleading in such case see this case and those cited therein.

(3) See Secs. 46 and 519.

(4) Sec. 1, Act March 22, 1817 (6 Sm. Laws, 438).

(5) Sec. 1, Act March 22, 1817 (6 Sm. Laws, 438).

as regulated by this act, shall be the same as directed by law in other similar cases.[6]

584. Service of Notices.

. . . . All notices whatsoever may, where a corporation is a party in any suit, be served on the president or other principal officers, or cashier, or secretary or chief clerk of such corporation.[7]

585. Service of Summons.

Every corporation, aggregate or sole, shall be amenable to answer upon a writ of summons as aforesaid, and in the case of a corporation aggregate, except counties and townships, service thereof shall be deemed sufficient, if made upon the president or the principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation, in the manner hereinbefore provided.[8]

586. Service of Summons in Actions for Damages for Trespass or Other Injury.

In actions for damages occasioned by a trespass or injury done by a corporation, if the officers aforesaid of such corporation, or any of them, shall not reside in the county in which such trespass or injury shall be committed, it shall be lawful to serve the summons upon any officer or agent of the corporation, at any office or place of business of the corporation within the county, or, if there be no such office or place of business, it shall be lawful to serve the summons upon the president or other principal officer, cashier, treasurer, secretary or chief clerk, in any county or place where they may be found.[9]

587. Service of Writs of Summons, Attachment in Execution and Scire Facias Upon Corporations in Personal Actions.

The common-law rule as to suits against corporations is still the general rule in Pennsylvania and any exceptions to it must rest on clear statutory authority. The Act of July 9, 1901, P. L., 614, regulates service only and does not confer jurisdiction. No suit

(6) Sec. 6, Act March 22, 1817 (6 Sm. Laws, 439).
(7) Sec. 5, Act March 22, 1817 (6 Sm. Laws, 439).
(8) Sec. 41, Act June 13, 1836, P. L., 579.
(9) Sec. 42, Act June 13, 1836, P. L., 579.

is authorized against a corporation except in a county where the corporate property is in whole or part located, or where it transacts a substantial part of its business.[10]

Second. The writ of summons, the writ of attachment in execution, and the writ of scire facias in personal actions, may be served by the sheriff upon a corporation, a partnership limited, or a joint-stock company, in the county wherein it is issued, in any one of the following methods:

(a) By handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk, or other executive officer, personally; or,

(b) By handing a true attested copy thereof to an adult member of the family of any one of said officers, at his dwelling-house;[11] or,

(c) By handing a true and attested copy thereof, at his place of residence, to an adult member of the family of the person with whom any of said officers reside; or,

(d) By handing a true and attested copy thereof, at his place of residence, to the manager or clerk of the hotel, inn, apartment-house, boarding-house, or other place of lodging where any of said officers reside; or,

(e) By handing a true and attested copy thereof, at any of its offices, depots or places of business, to its agents or persons for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed;[12] or,

(10) Park Bros. & Co., Ltd. *v.* Oil City Boiler Works, 204 Pa., 453 (1903); Bailey *v.* Williamsport & N. B. R. R. Co., 174 Pa., 114 (1896); Jensen *v.* Phila. M. & S. St. Ry. Co., 201 Pa., 603 (1902); Ludlow et al. *v.* Valley Coal & Stone Co., 30 Pa. C. C., 389 (1904).

(11) Service upon the vice-president and general manager of a corporation by leaving a true and attested copy of the writ at his dwelling house with an adult member of his family is a compliance with this provision. O'Neill *v.* Phila. Rapid Transit Co., 29 Pa. C. C., 133 (1903).

(12) The following return: "Served, by handing, April 13, 1905, a true and attested copy of the within writ at No. 522 Arcade Building, 15th and Market Streets, Philadelphia, the office of the said defendant company, to J. Mooney, the person for the time being in charge, being unable to ascertain the residence of any of the officers of the said company within the county upon inquiry at said office" is full and explicit on its face, complies strictly with the Act of July 9, 1901, and will not be set aside on motion

(f) If the corporation, partnership limited, or joint-stock company has no office or place of business in actual operation in the county where the cause of action arose, then service may be made in such county upon any member of its board of directors, in any of the methods set forth in clauses (a), (b), (c), or (d), hereof,[13] or,

(g) If the corporation, partnership limited, or joint-stock com-

or rule. Popowicz *v.* Worth Bros., 32 Pa. C. C., 148 (1906). To enable a sheriff to serve a writ upon an agent he must first, upon inquiry at the office or place of business of the corporation, be unable to ascertain the residence of any officers thereof in the county, and this must appear in the return. Haynes *v.* N. Y. Central & H. R. R. Co., 32 Pa. C. C., 663 (1906).

Service may be made upon a corporation as prescribed in paragraph (e), on a "Sales Agent" in charge of a branch office, being the only office of the company in the county wherein the suit is brought. Phœnix Iron Works Co. *v.* Mullen, 28 Pa. C. C., 587 (1903).

A sheriff's return of service was as follows: "January 13, 1903, served personally the within writ on the defendant company at its office in the Borough of Leechburg, Pa., by handing a true and attested copy thereof to J. S. Patterson, superintendent of said company, then in charge of said office, and the said J. S. Patterson was informed of the contents of said writ, it being ascertained upon inquiring from him that none of the executive officers of said company resides in the county of Armstrong." Held that the return was good under Clause (e), *supra;* that the return was good on its face and hence might not be set aside upon extraneous evidence, and that an order setting aside the return was a final order which might be appealed from. Ben Franklin Coal Co., Ltd. *v.* Penna. Water Co., 25 Pa. Super. Ct., 628 (1904).

This clause authorizes service of summons upon a corporation at its place of business within the county where the writ issued, when neither the president, secretary, treasurer, cashier, chief clerk or other executive officer of the company resides within the county. Warner *v.* Lehigh Valley R. R. Co., 15 D. R., 681 (1905). See, however, Western Penna. Fuel Co. *v.* Rodgers, 14 D. R., 310 (1905).

A constable's return of service of a summons issued by a justice of the peace, as follows: "Served by handing a true and attested copy to E. M. C., agent for E. G. & Co., a corporation," does not show a service authorized by the Act of April 23, 1903, Section 2, Clause E, and the proceedings will be set aside on certiorari. Van Kirk *v.* Gately & Co., 15 D. R., 616 (1906).

Service upon a corporation may not be obtained, under the Act of July 9, 1901, Sec. 2, P. L., 614, by serving a writ on one of its directors at his residence in a county in which the cause of action did not arise. O'Neill *v.* Phila. Rapid Transit Co., 14 D. R., 502 (1903).

(13) Act July 9, 1901, P. L., 614.

pany has no office or place of business in actual operation in the county in which the cause of action arose, and no member of its board of directors, or other officer, is a resident of the county in which the cause of action arose, then service may be made in any of the methods set forth in clauses (a), (b), (c), (d), (e), or (f) hereof, in any other county than that in which the writ issues, by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the writ issues; or,

(h) In the case of a registered foreign corporation, partnership limited, or joint-stock company, by serving its duly registered attorney as in the case of a summons issued against him personally, or by leaving a true and attested copy thereof for him, at the registered place, if he be not found there during the usual business hours of any business day, with the person for the time being in charge of the business carried on at such place.[14]

Provided, That two returns of nihil habet shall be equivalent to personal service, in writs of scire facias to revive judgments entered in personal actions.

Third. The writ of summons, in cases where a trespass or nuisance has been committed on real estate, may also be served in the manner provided by sections one and two, in any other county than that in which the writ issues, by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the writ issues.

Fourth. The writ of summons, on any character of insurance policy or certificate, may also be served in the manner provided by section two, in any other county than that in which the writ issues, by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the writ issues, if the insurance was effected in, or the insured person at the time of his death resided in, or the insured property at the time of loss was located in, the latter county: *Provided,* That in such event the court shall abate the writ if it shall be made to ap-

(14) Paragraphs "g" and "h" are amendments of the Act of April 3, 1903, P. L., 139, to the Act of July 9, 1901, P. L., 614. The method of service on registered foreign corporations provided in Paragraph (h) is in addition to the other provisions of Section 2, and not exclusive thereof. Hence foreign corporations may be served the same as domestic corporations in any of the different methods set forth in paragraphs a, b, c, d, e, f. and g. Elk Flint Bottle Co. *v.* Lockwood, 34 Pa. C. C., 56 (1907). See, however, Brown *v.* Amer. Telephone & Teleg. Co., 16 D. R., 664 (1906).

pear, at any time before verdict or judgment by default, that the insurance was not effected in, nor was the insured person residing at the time of his death in, nor was the insured property at the time of loss located in, the county in which the writ was issued.

Fifth. The writ of summons against a foreign corporation may also be served in the manner provided by section two, in any other county than that in which the writ issues, by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the writ issues, if the cause of action arose in the latter county: *Provided,* That in such event the court shall abate the writ if it shall be made to appear, at any time before verdict or judgment by default, that the cause of action did not arise in the county in which the writ was issued.[10]

588. Service of Writs of Quo Warranto and Mandamus.

Service of the writ of quo warranto and the writ of mandamus may be made upon the defendant wherever found, as in the case of a summons.[11]

589. Service of Process on Corporations Having Agents in Any County of the State.

In any case when any insurance company or other corporation shall have an agency or transact any business in any county of this Commonwealth, it shall and may be lawful to institute and commence an action against such insurance company or other corporation, in such county, and the original writ may be served upon the president, cashier, agent, chief or any other clerk, or upon any directors or agents of such company or corporation, within such county, and such service shall be good and valid in law to all intents and purposes.[12]

590. Service of Process Upon Directors of Corporations.

When any action is commenced by any person against any corporation, in any county in which the property of said corporation was wholly or in part situated, it shall be lawful, if the presi-

(10) Clauses 2 to 5, inclusive, Act of July 9, 1901, P. L., 614. Only so much of this act is given as refers specially to corporations.

(11) Clause 13, Act July 9, 1901, P. L., 619.

(12) Sec. 6, Act April 8, 1851, P. L., 354.

dent, treasurer, secretary or chief clerk do not reside or cannot be found in such county, for the sheriff or officer to whom any process may be directed, to serve the same on any manager or director, in such county, and the service so made shall be deemed sufficient; and in case no director or manager can be found in such county, it shall be lawful for the sheriff or other officer to whom such process is directed, to go into any county to serve the process aforesaid.[13]

591. Service of Process on Domestic Corporations Whose Principal Office is Located Out of the State.

In all cases where any company has been incorporated by this Commonwealth, and the principal office for the transaction of business thereof shall be located out of this State, or where the president, treasurer, cashier or other principal officer of such company shall reside out of this State, it shall be lawful to sue such company in any county of this State where the works of such company shall be located, or adjoining thereto, or where any director, manager or other officer of such company shall reside; and service of legal process upon such director, manager or other officer shall be valid and effective upon said company; and such company shall be taken, both in law and in equity, for every purpose of legal proceeding, to be located in this State; and shall also be liable to the writs of quo warranto, mandamus, attachment and execution; and service of such writ upon any manager, director or other officer of such company, shall be, to all intents and purposes, as effective as if served upon the president of such company, and he resident of this State, and as if the locality of such company's office were within this State; and any property, of any description, of such company, which would be liable to attachment or execution, if the same were located in this State, shall be taken to be in this State for such purpose; and shall be liable to levy and sale in the same manner as if the officers of said company were located in the county of this State in which the same is made liable to be sued by the provisions of this act.[14]

592. The Same Subject Continued.

In all cases where any company has been incorporated by this

(13) Sec. 1, Act March 17, 1856, P. L., 388.
(14) Sec. 2, Act March 15, 1847, P. L., 361.

Commonwealth, and the principal office for the transaction of business thereof shall be located out of this State, and where none of the officers upon whom process can be served under the existing laws of the Commonwealth, reside in the State, it shall be lawful to sue said company in any county in this State where the said company, at any time, transacted the business thereof, or where the works or real estate of such company were located; and such legal process may be served on such company, by publication of a copy of the process in such newspaper as the court may direct, for six weeks previous to the return day; and for every purpose of legal proceeding, such company shall be taken, both in law and equity, to be located in this State, and shall be liable to writs of quo warranto, mandamus, attachment and execution, and service of such process, by publication as aforesaid, shall be, to all intents and purposes, as effective as if served upon the president of such company, or other officer of the same, and he or they resident of the proper county of this State, and as if the company's office were within the State; and any property, of any description, of such company, within the State, shall be liable to attachment and execution; and any such property, which would be liable to attachment or execution, if the said office were located in this State, shall be taken to be in this State for such purpose, and shall be liable to levy and sale in the same manner as if the officers of said company resided in the county in this State, in which the same is liable to be sued by the provisions of this act.[15]

A domestic corporation whose chief place of business is outside the State is properly served with process issued out of a county where its works are located, under the Act of March 15, 1847, by service upon a director residing in an adjoining county. The Act of June 14, 1836, provided for service in certain cases not included in the subsequent Act of 1847. The Act of May 25, 1881, P. L., 32, relating to the issue of writs of mandamus against the officers of corporations, is a supplement to the Act of 1836, and not necessarily in conflict with the Act of 1847, which it does not repeal. The Act of 1847 was passed to cover the inconvenience arising from the decision in Whitemarsh Township *v.* Philadelphia, G. & N. R. Co., 8 W. & S., 365, holding that a Court of Common Pleas cannot issue a mandamus to a railroad company

(15) Sec. 1, Act April 11, 1862, P. L., 449.

whose office and chief place of business is not in such county, though its road may pass through the same.[16]

593. Service on Agent or Clerk.

Where any person or persons being residents of this Commonwealth, shall engage in business in any other county than the one in which he, she or they shall reside, and not being in the county at the time of issuing such writ or process, it shall be lawful for the officer charged with the service thereof to serve any writ of summons, or any other mesne process upon the agent or clerk of any such defendant, at the usual place of business or residence of such agent or clerk, and to have the same effect as if served upon the principal personally.[16*]

It seems that the foregoing provision relates to service upon corporations as well as on individuals, and a return of service on a non-resident corporation setting forth that service was made on the agent or clerk of the corporation "at the usual place of business of said defendant" is fatally defective if it does not further set out that the service was made at the usual place of business or residence of the agent or clerk of the defendant.[17]

594. Service of Process on Toll-Gatherers.

The service of any civil process upon the toll-gatherer of any incorporation, in the proper county, and next to the place where the damage or damages shall have been committed, shall be held as good and valid in law, as if served on the president or other principal officer, or the cashier, treasurer, secretary or chief clerk of the corporation, as aforesaid; and upon such service the like proceedings shall be had as is directed by the aforesaid act to which this is a supplement: *Provided,* That where a suit shall be commenced and the process served on the toll-gatherer, it shall be the duty of the plaintiff, his agent or attorney, to cause reasonable notice to be given to some one of the officers of the company aforesaid, of the commencement of any such suit, before trial and final judgment.[18]

(16) Com. *v.* N. Y., P. & O. R. Co., 138 Pa., 58 (1890).
(16*) Sec. 1, Act May 4, 1852, P. L., 574.
(17) Goodwin *v.* James Wherry Co., 26 Pa. C. C., 570 (1902).
(18) Sec. 1, Act March 16, 1833, P. L., 78.

595. Service of Process Upon Railroad Companies and Canal Companies.

When any action is commenced by any person or persons, or bodies corporate, against an incorporated railroad or canal company, in any county in which the corporate property of such company is wholly or in part situated, it shall be lawful, if the president, treasurer, secretary or chief clerk of such corporation does not reside, or cannot be found in such county, for the sheriff or other officer to whom such process is directed, to serve the same on any manager or director of such company, being in such county, and the service so made shall be deemed sufficient; and in case no director or manager can be found in the county, it shall be lawful for such officer to go into an adjoining county to serve the process as hereinbefore stated.[19]

596. Service of Process on Stockholders in Actions for Unpaid Instalments of Capital Stock or for Statutory Liability.

In all actions or proceedings now or hereafter brought or instituted in any county within this Commonwealth, to charge the stockholders of any corporation with any of the debts of such corporation, or to enforce payment of instalments due upon stock, service of summons or other process, may be made upon the stockholders resident within such county in the same manner as writs of summons are now directed to be served, and upon those residing in other counties of this Commonwealth, by the sheriff of the county in which they may respectively reside, and upon those non-residents of this Commonwealth by publication for four successive publications in a newspaper published within the county where such action or proceeding is brought or instituted, and also in the State in which such non-residents may reside, as the court from which such action or proceedings shall issue may direct, and a copy of such publication shall be mailed to the post office address of such non-resident stockholders, if such address can be ascertained.[20]

597. Costs of Suit for Interest on Corporate Bonds to Include Counsel Fees.

In all cases where railroad or other corporations, not munici-

(19) Sec. 8, Act March 21, 1842, P. L., 145.
(20) Act May 14, 1874, P. L., 146.

pal, shall be liable, either as principals or guarantors, to pay the interest on bonds, the validity of which bonds shall have been established by a court of competent jurisdiction, and such corporations, subject the holders of such bonds to the necessity of bringing suit to recover the said interest, the said corporation shall, in addition to the ordinary costs of suit, pay the fees of plaintiff's counsel, not exceeding ten per cent. on the amount recovered.[21]

The true intent and meaning of an act entitled "An act compelling railroad and other corporations to pay fees of plaintiff's in certain cases," approved March 3d, 1866, be and is hereby declared to be, that corporations named in said act shall only be liable to pay the plaintiff's counsel fees, in case said corporations have contested the validity of the bonds for the recovery of the interest on which suit has been brought, and such validity has been established by a court of competent jurisdiction.[22]

598. Decisions Relative to Service on Corporations.[23]

The 41st section of the Act of June 13, 1836, provides that service is to be deemed sufficient "if made upon the president or other principal officer, or on the cashier, treasurer, secretary or chief clerk of such corporation." Where, in an action of assumpsit against the Bank of Pennsylvania, service was had on the cashier of its office of deposit and discount at Reading, held, that the cashier referred to in the act was the cashier of the bank at Philadelphia, and not the cashier of any of its branches.[24]

The person referred to in said act as the "president or other principal officer," means the chief executive officer of the corporation, though called president, chairman or by any other title.[25]

Under the Acts of March 17, 1856, P. L., 388; March 21, 1842, P. L., 145, and March 15, 1847, P. L., 261, the words "manager or director" are synonymous and mean one of the body of persons appointed pursuant to the charter or by-laws of the corpora-

(21) Sec. 1, Act May 3, 1866, P. L., 116.

(22) Sec. 1, Act March 16, 1871, P. L., 231.

(23) See Sec. 587. For service on Foreign Corporations, see Secs. 587, 600 and 736.

(24) Probst *v.* Bank of Penna., 5 W. & S., 379 (1843).

(25) Dale *v.* Blue Mountain Mfg. Co., 167 Pa., 402 (1895).

tion to manage its affairs. Hence a return of service made on a "general manager" is not good.[26]

The language of Sec. 1, Act of March 22, 1817, "that suits may be brought against corporations by their corporate names before any court or magistrate of competent jurisdiction" does not mean that suits may be brought against corporations anywhere throughout the State, without regard to the company's place of business, or the location of its property.[27]

When an appearance by a corporation is relied on to cure a defective service the record must show that one or more of the persons on whom service may be made under the provisions of the Act of April 23, 1903, appeared for it.[28]

A corporation may not be sued except in a county where the corporate property is in whole or part situated or a substantial part of its business is transacted.[29]

A company having all its property in Lycoming and Sullivan counties, its principal office in Lycoming, and having no agent, property or office in Philadelphia, was sued in Philadelphia county. Service was had upon the treasurer while he was in Philadelphia temporarily. Held, that the summons should be set aside.[30]

But, although the entire railroad of a street railway company may be in one county, where it also maintains its principal office, yet a suit in trespass may be maintained in another county for a cause of action arising in the first county, and a good service may be had upon the president at his residence in the second county, where it appears that both the president and the secretary of the company reside in the second county, in which county the company maintains an office occupied by the secretary, where much of the correspondence is carried on, where the directors meet and the corporate seal is kept and used for a part of the year; where

(26) Dale *v.* Blue Mountain Mfg. Co., 167 Pa., 402 (1895); Johnson *v.* Carbon County Elec. Ry. Co., 18 Pa. C. C., 479 (1896).

(27) Bailey *v.* Williamsport & North Branch R. Co., 174 Pa., 114 (1896).

(28) Van Kirk *v.* Gately & Co., 15 D. R., 616 (1906).

(29) Bailey *v.* Williamsport & North Branch R. Co., 174 Pa., 114 (1896); Edelstein *v.* Del. Co. & Phila. Elec. R. Co., 19 Pa. C. C., 95 (1896); 6 D. R., 72. See O'Neill *v.* Phila. Rapid Transit Co., 29 Pa. C. C., 133 (1903).

(30) Bailey *v.* Williamsport & North Branch R. Co., 174 Pa., 114 (1896).

the company's ledger accounts are kept and much other business is carried on.[30*]

So, service upon the president of a foreign corporation not doing business in Pennsylvania or having any agent therein, such president being a resident of Pennsylvania, does not give the courts of Pennsylvania jurisdiction of a suit against such company.[31]

Service cannot be had upon an officer of a corporation temporarily within the territorial limits of a court, where the company has neither office nor agent, and where it transacts no business.[32]

Service of process upon an agent in charge of an exhibit at a public exposition, made by a corporation having no office in the State and not doing business therein will be set aside.[33]

But in a later case it was held that service of summons upon the secretary of a corporation, while visiting the county in which the suit was brought, and in which the contract which was the subject of the suit was made, is valid. "The service in this case was under the 41st section of the Act of June 13, 1836, P. L., 579, which was broad enough to cover service upon the proper officer in any county."[34] Service of process made upon a corporation defendant when in attendance at court, by its president and treasurer as a suitor and witness, will be set aside.[35]

Under the Act of March 17, 1856, P. L., 388, service of process upon an officer of a corporation outside the county in which the action is begun is not authorized unless the property of the company was wholly or in part situated in the county in which the suit was brought, at the time the action was begun. It is not enough that it was so situated when the cause of action arose.[36]

(30*) Jensen *v.* Phila., Morton & Swarthmore St. Ry. Co., 201 Pa., 603 (1902); Samuel *v.* Amer. Iron & Steel Mfg. Co., 10 D. R., 43 (1901).

(31) Cleveland Builders' Supply Co. *v.* Hoosier Cement Company, 25 Pa. C. C., 341 (1901); Phillips *v.* Library Co., 141 Pa., 462 (1891); McConkey *v.* Peach Bottom Slate Co., 3 D. R., 594 (1894).

(32) Bailey *v.* Williamsport & North Branch R. Co., 174 Pa., 114 (1896). See White *v.* Merchants' & Mfrs. Nat. Bank, 12 Pa. C. C., 254 (1892).

(33) L. S. Waterman Co. *v.* Parker Pen Co., U. S. Cir. Ct., 9 D. R., 194 (1900).

(34) Dick & Whitla *v.* Meadville St. Ry. Co., 7 D. R., 350 (1898).

(35) Western N. Y. & Pa. R. Co. *v.* Clermont & Marvin Creek R. Co., 9 D. R., 299 (1900).

(36) Hawn *v.* Penna. Canal Co., 154 Pa., 455 (1893).

Service upon a domestic corporation cannot be had by serving its traveling freight agent at his office, which is not the principal office of said company, and is outside of the county where the trespass for which action is brought occurred, and of the county where the corporate property is situated.[37]

Where a bill in equity against a foreign corporation for discovery and account is served on such corporation in the state of its domicile under an order of court made agreeably to the provisions of the Act of April 6, 1859, P. L., 387, the service will be set aside. In proceedings in personam the act cannot authorize such extra-territorial service of process.[39]

599. What Returns of Service on Corporations Must Show.

The return of service of summons must show the official status of the person served, so that it may be apparent upon the face of the return that the service was made in accordance with law. "Served a true copy . . . . at the office, in presence of John B. Irwin," is defective, and will not be cured by the appearance of Irwin before the justice of the peace whose record showed no authority on the part of Irwin to bind the company.[40]

Where service is made upon the Commissioner of Insurance, as the agent of an insurance company, to accept service, and the same is made upon the deputy, the return should show that the Commissioner of Insurance was absent, and that the deputy is the chief deputy.[41]

A return of service on "A. B., last president of said corporation," is equivocal and will be set aside.[42]

It has been held, however, that a return of service under the Act of March 21, 1849, Sec. 3, which fails to set forth the character of the agent served is *prima facie* evidence of good service, though this presumption may be rebutted by proof to the contrary.[43] But in a later case it has been held that when the sheriff's return, on its face, shows a legal service of a summons, it is con-

(37) Zablocki *v.* Del., Lack. & Western R. Co., 10 D. R., 54 (1901).

(39) Wallace *v.* United Electric Co. et al., 211 Pa., 473 (1905).

(40) Emmensite Gun & Ammunition Co. *v.* Pool, 6 D. R., 47 (1896).

(41) Reynolds *v.* Supreme Conclave, Improved Order of Heptasophs, D. R., 622 (1900).

(42) Powder Co. *v.* Coal Co., 8 W. N. C., 76 (1880).

(43) Hagerman *v.* Empire Slate Co., 97 Pa., 534 (1881).

clusive as between the parties to the action, and that it is error to set aside service upon extraneous evidence.[44]

Service of summons on a registered foreign corporation can, since the Act of July 9, 1901, P. L., 614, be made in no other manner than that provided by Sec. 2, Cl. "G", and the 5th section of said act.[45]

When a foreign corporation transacting business in this State has failed to establish an office and report the name of its agent to the Secretary of the Commonwealth, but has some person residing therein who acts as its agent, it must be presumed that the corporation has substituted such agent as one on whom service is authorized to be made.[46]

A foreign corporation not registered in Pennsylvania under the provisions of the Act of April 22, 1874, cannot be subjected to the jurisdiction of the courts of that State by service of process upon its president, a resident of Pennsylvania, where it appears that the company is not doing business within the Commonwealth and has no office or place of business therein.[47]

600. Service of Process Upon Foreign Corporations.[48]

And in the commencement of any suit or action against any such foreign corporation, process may be served upon any officer, agent or engineer of such corporation, either personally or by copy, or by leaving a certified copy at the office, depot or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes.[49]

In any case when any insurance company or other corporation shall have an agency or transact any business in any county of this Commonwealth, it shall and may be lawful to institute and commence an action against such insurance company or other corporation, in such county, and the original writ may be served upon the president, cashier, agent, chief or any other clerk or upon any directors or agents of such company or corporation

(44) Goodwin *v.* James Wherry Co, 26 Pa. C. C., 570 (1902).

(45) Brown *v.* Amer. Teleph. & Teleg. Co., 32 Pa. C. C., 257 (1906).

(46) Hagerman *v.* Empire Slate Co., 97 Pa., 534 (1881); Brown *v.* Amer. Teleph. & Teleg. Co., 32 Pa. C. C., 257 (1906).

(47) Larzelere Machine Co. *v.* Youken-Merriman Co., 28 Pa. C. C., 205 (1903).

(48) See Secs. 587, 736.

(49) Sec. 3, Act March 21, 1849, P. L., 216.

within such county, and such service shall be good and valid in law to all intents and purposes.[50]

When any person or persons, not being residents of this Commonwealth, shall engage in business in any county of this Commonwealth, it shall and may be lawful for the officer charged with the execution of any writ or process issued out of any of the courts of this Commonwealth, to serve the same upon any clerk or agent of such person or persons at the usual place of business or residence of such agent or clerk, with like effect as though such writ or process was served personally upon the principal.[51]

A foreign railway company having a freight solicitor in Philadelphia whose only duties are to solicit inter-state freight and issue bills of lading therefor may not be served with process through such agent.[52]

Service upon the president of a foreign corporation at his dwelling house in the county where the proceedings were brought, by leaving a copy of the summons with an adult member of his family, is a valid service under the Act of March 21, 1849, P. L., 216.[53]

When a foreign corporation has designated an agent to receive service of writs against it, he is to be regarded as a resident of each and every county of the State and consequently suit may be brought against the corporation in any county where it has prop-

(50) Sec. 6, Act April 8, 1851, P. L., 354.

(51) Act April 21, 1858, P. L., 403.

(52) Sheetz *v.* Chesapeake & Ohio Ry. Co., 25 Pa. C. C., 177 (1901). In National Bank of the Republic *v.* N. Y., C. & H. R. R. Co., 8 W. N. C., 252 (1880), it was held that service upon the agent of a foreign railroad company for procuring freights was good, and in Crawford *v.* Cunard S. S. Co., Id., 567 (1880), service of summons upon an agent for the sale of tickets of a foreign steamship company was held sufficient; and in Retterly *v.* Howe Machine Co., 4 W. N. C., 525 (1877), it was held that service might be made upon *any* agent of a foreign corporation, aside from an insurance company, whether the agent designated by it under the Act of April 22, 1874, or another, and apparently the return need not set forth that the company is a foreign company. Kalbach *v.* N. Y., L. E. & W. R. Co., 38 Leg. Int., 478 (1881); 11 W. N. C., 174 (1881).

(53) Johnson et al. *v.* Amer. Bill Posting Co., 13 Pa. C. C., 96 (1891). See Benwood Iron Wks. *v.* Hutchinson & Bro., 101 Pa., 359; Coxe *v.* Camden & Atlantic R. R. Co., 11 W. N. C., 386 (1882); Eby *v.* Northern Pacif. Ry. Co., 6 W. N. C., 385 (1878).

erty, and service may be made on its designated agent in another county.[54]

Service upon an agent of a foreign railroad company at a point within the State, and leaving a certified copy in the office attached to the depot is a good service despite the fact that the defendant company is in the hands of receivers.[55]

The Act of April 8, 1851, P. L., 354, authorizing service on agents of corporations, refers only to foreign corporations. Domestic corporations must be served on a director or other officer.[56]

A foreign corporation may be served by leaving a copy of the writ at the dwelling house of the officer.[57]

If a foreign corporation fails to register as required by the Act of April 22, 1874, a service made upon any agent of the company, in accordance with the Act of March 21, 1849, Sec. 3, P. L., 216, will be good. A return of service under said act which fails to set forth the character of the agent served is *prima facie* evidence of good service, but this presumption may be rebutted by proof to the contrary.[58]

Where an agent of a foreign corporation, having its principal place of business in the State of its creation, enters into Pennsylvania, stops at a hotel, spreads out his samples and invites and receives customers, he makes the hotel the place of business of his company in Pennsylvania, and if the corporation recognize the contracts there made by him, he is a proper party on whom summons may be served.[59]

The return of service on a non-resident corporation that it was made on the agent or clerk of the corporation "at the usual place of business of the said defendant" is fatally defective if it does not further set forth that the service was made at the usual place of business or residence of the agent or clerk of the defendant.[60]

601. Service of Process on Foreign Beneficial Associations.

Any fraternal, beneficial or relief society, as defined under the

(54) Sattler & Co. *v.* Aultman & Taylor Mach. Co., 6 D. R., 419 (1897); Gardner Shingle Co., Limited *v.* Nicola Bros., 25 Pa. C. C., 303 (1901).
(55) Hill *v.* Receivers of B. & O. R. Co., 7 D. R., 473 (1897).
(56) Williams *v.* Del., Lack. & Western R. Co., 28 W. N. C., 282 (1891).
(57) Coxe *v.* Camden & Atlantic R. Co., 39 Leg. Int., 189 (1882).
(58) Hagerman *v.* Empire Slate Co., 97 Pa., 534 (1881).
(59) Bragdon *v.* Perkins-Campbell Co., 19 Pa. C. C., 305 (1897).
(60) Goodwin *v.* James Wherry Co., 26 Pa. C. C., 570 (1902).

provisions of the first section of the Act of Assembly entitled "An act defining fraternal, beneficial and relief societies and their status, authorizing them to create subordinate lodges and to pay benefits, upon the sickness, disability or death of their members, from funds collected by dues and assessments therein, providing for their registration in the office of the Insurance Commissioner, and requiring that they shall make annual reports to him, and exempting them from taxation and from the supervision of the Insurance Commissioner," approved the sixth day of April, Anno Domini one thousand eight hundred and ninety-three, now doing or hereafter admitted to do business within this State, and not having its principal office within this State, and not being organized under the laws of this State shall appoint, in writing, the Commissioner of Insurance or his successor in office to be its true and lawful attorney upon whom all lawful process in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served upon the association, and that the authority shall continue in force so long as any liability remains outstanding in this State; copies of such certificate certified by said Commissioner of Insurance shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service upon such attorney shall be deemed sufficient service upon such association. When legal process against any such association is served upon said Commissioner of Insurance he shall immediately notify the association of such service, by letter prepaid and directed to its supreme secretary, or corresponding officer, and shall, within two days after such service, forward in the same manner a copy of the process served on him to such officer: *Provided, however,* That such process shall be served at least thirty days prior to the return day of the same. The plaintiff in such process so served shall pay to the Commissioner of Insurance at the time of such service a fee of three dollars, which shall be recovered by him as part of the taxable costs if he prevails in the suit. The Commissioner of Insurance shall keep a record of all processes served upon him, which record shall show the day and hour when such service was made.[61]

All societies mentioned in the first section of this act now doing

(61) Sec. 1, Act June 25, 1895, P. L., 280.

business within this State shall comply with the provisions of this act within thirty days from the passage of the same, and all such societies hereafter applying for authority to do business in this State shall comply with its provisions as a condition precedent to doing business in the State.[62]

602. Suits Against Insurance Companies.

In addition to the remedies now provided by law, it shall be lawful for any person or persons, body politic or corporate, who may have a cause of action against any insurance company incorporated by the Legislature of this Commonwealth, or against any insurance company that may have an agency established in this Commonwealth, to bring suit in a Court of Common Pleas, or before any justice of the peace, alderman or magistrate, in any county where the property insured may be located, or, in cases of live stock insurance, where the owner may reside, and to direct any process to the sheriff or constable of either of the counties in this Commonwealth, and it shall be the duty of said sheriff or constable to execute all process directed to him under the provisions of this act, upon the president or other chief officer of the company against whom the same issued as he shall be directed, or upon the agent of any company incorporated, or not incorporated, by the Legislature of this Commonwealth; and the manner of service and return shall be in the same manner as like process is now by law required to be made, and the same shall be returned to the court, justice of the peace, alderman or magistrate issuing the same, and all proceedings upon any suit not under this act, shall be the same as in other cases.[63]

603. Service of Process on Foreign Insurance Companies.

No insurance company, not of this State, nor its agents, shall do business in this State until he has filed with the Insurance Commissioner of this State a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company served on the Insurance Commissioner, or the party designated by him, or the agent specified by the company to receive service of process for said company, shall have the same effect

(62) Sec. 2, Act June 25, 1895, P. L., 280.

(63) Sec. 1, Act May 13, 1889, P. L., 198. This is a re-enactment, with amplifications, of the provisions of Sec. 1, Act April 24, 1857.

as if served personally on the company within this State and if such company should cease to maintain such agent in this State so designated, such process may thereafter be served on the Insurance Commissioner; but so long as any liability of the stipulating company to any resident of this State continues, such stipulation cannot be revoked or modified, except that a new one may be substituted, so as to require or dispense with the service at the office of the said company within this State, and that such service of process according to this stipulation shall be sufficient personal service on the company. The term process shall be construed to mean and include any and every writ, rule, order, notice, or decree, including any process of execution that may issue in or upon any action, suit, or legal proceeding to which said company may be a party by themselves, or jointly with others, whether the same shall arise upon a policy of insurance or otherwise, by or in any court of this Commonwealth having jurisdiction of the subject matter in controversy, and all writs, rules, orders, notices, or decrees aforesaid, shall be directed to the sheriff, constable, or other officer authorized by law to serve similar writs, of the county wherein the same shall be issued, who is hereby authorized to serve the same on any and every person or persons, body politic or corporate, named in said process with said company, either as plaintiff, defendant or otherwise, or who may be impleaded in said action, suit or proceeding with said company found in said county, and either before or after the service on the person or persons, body politic or corporate, found in said county aforesaid, as may be directed by the plaintiff or person issuing said process or his attorney, and in the absence of such direction as shall be most convenient, the officer to whom said process may be directed, shall, by writing endorsed on or attached to said process, deputize the sheriff, constable or other officer of the county where the State agent designated by any company, as provided by law to receive service of process for said company may reside, to serve the same on him; and in default of an agent appointed by the company as aforesaid, then the officer so charged with the service of said process, shall, in like manner, deputize the sheriff, constable or other officer aforesaid of the county where the agent, if any there be, named by the Insurance Commissioner may reside, to serve the same on him; and in default of such agent named by the Insurance Commissioner as aforesaid, then in like manner to deputize the sheriff, constable or other officer as aforesaid of the county

where the office of the Insurance Commissioner may be located, to serve the same upon him, and each and every service so made, shall have the same force and effect to all intents and purposes as personal service on said company, in the county where said process issued; and the fees of the officers serving said process shall be the same as are allowed by law for services in similar cases, with mileage allowed by law in such cases, the distance to be computed from the residence of the officer serving or executing the same, and no further, and all necessary postage paid by either of said officers shall be charged for as costs in the case.[64]

Under the foregoing act, service of summons on a foreign insurance company doing business in this State, where no service can be had in the county whence the process issues, can be had (a) on the agent designated by the company; (b) on the person designated by the Insurance Commissioner, or (c) on the Insurance Commissioner himself. When service is made on the deputy Insurance Commissioner the return should show that service was made in the absence or inability of the Commissioner and that the deputy is the chief deputy.[65]

The method of service provided by the Act of April 4, 1873, P. L., 20, as amended by the Act of June 20, 1883, was intended to supersede the methods provided by the Acts of March 21, 1849, and April 8, 1851, for service on foreign insurance companies. Where a foreign insurance company has complied with the acts of 1873 and 1883, as to the service of process upon a designated agent, service within the State must be made upon that agent, and not upon an officer of the corporation who is casually within the State [66] nor upon an agent appointed merely to solicit risks.[67]

The Act of July 9, 1901, (Sec. 524) does not change the law relative to service of process on foreign insurance companies.[68]

Service of process could not be made upon a life insurance com-

(64) Act of June 20, 1883, P. L., 134, amending Sec. 1, Act April 4, 1873, P. L., 20.

(65) McCann *v.* Old Wayne Mut. Life Ins. Co., 10 D. R., 560 (1901); Reynolds *v.* Supreme Conclave Imp. Order of Heptasophs, 9 D. R., 622 (1900).

(66) Busch *v.* World Mut. Benefit Assn., 16 Pa. C. C., 361 (1895).

(67) Liblong *v.* Kans. Fire Ins. Co., 82 Pa., 413 (1876); Parke *v.* Com. Ins. Co., 44 Pa., 422 (1863); Dillon *v.* Met. Life Ins. Co., 16 D. R., 119 (1907); Cowan *v.* Met. Life Ins. Co., 16 D. R., 119 (1907).

(68) Hall *v.* Metropolitan Life Ins. Co. of N. Y., 32 Pa. C. C., 14 (1906); 15 D. R., 144.

pany outside of the county in which the writ was issued, under the provisions of the Acts of April 24, 1857, and April 8, 1868, which applied only to fire insurance companies.[69]

In order to sustain the judgment of a justice in a suit against a foreign insurance company where the process is served outside of the county, the record should show: 1. That the defendant is a foreign insurance company. 2. That the summons issued to a constable of the county in which the justice resides. 3. That such constable deputized, by writing endorsed on or attached to the summons, a constable of the county where the State agent of the company resides, to serve the process on him. 4. That the person upon whom the process was served was the duly designated State agent to receive service of process, and this should appear by the return.[70]

604. A Plea in Abatement the Method of Questioning Returns of Service.

The practice Act of May 25, 1887, did not abolish pleas in abatement of the jurisdiction, and such a plea is a proper practice to question a sheriff's return of service.[71]

605. Foreign Corporations May Sue in State Courts.

Foreign corporations may institute and maintain suits in their corporate name in the courts of Pennsylvania.[72]

606. Chancery Jurisdiction Over Corporations.

"Under the Act of 16 June, 1836, the courts are invested with full chancery powers over corporations: See Com. *v.* Bank of Pennsylvania, 3 W. & S.; and can supervise and control them through the equity powers conferred by the act as fully as a chancellor of England could do in the exercise of his functions. May we not, therefore, stay the hand of a corporation from doing an unreasonable thing outside of its ordinary business sphere as

(69) Anspach *v.* Guardian Mut. Aid Society, 10 W. N. C., 568 (1881).

(70) Metropolitan Life Ins. Co. of N. Y. *v.* Cook, Admr., 14 Pa. C. C., 434 (1894).

(71) Shutz *v.* Chesapeake & O. Ry. Co., 25 Pa. C. C., 177 (1901).; Matthers *v.* Morris Glass Co., 32 Pa. C. C., 171 (1906).

(72) Stewart *v.* U. S. Ins. Co., 9 Watts, 126 (1839).

well as within it? No limitation of this nature is found in the act." [73]

The power conferred upon the courts by the Act of June 16, 1836, Sec. 13, includes that of supervising and controlling the election of directors, whenever it is made to appear that a fair and honest election cannot otherwise be had.[74]

Under the third section of the fifth article of the Constitution of 1874 the Supreme Court "shall have original jurisdiction in cases of injunction where a corporation is a party defendant." This applies as well to cases where a municipal corporation is a party defendant as where a private corporation is such defendant.[75]

Courts of equity have jurisdiction and power to declare what regulations imposed by councils of cities and boroughs on natural gas companies are illegal and to restrain such cities or boroughs from enforcing them.[76]

607. Suits in Equity by or Against Corporations.

A trading corporation being a resident and a taxpayer in a city may maintain a taxpayer's bill to restrain illegal action on the part of city officers in the appropriation of public funds.[77]

Where it appeared that a stockholder who had brought a bill in equity against a corporation had become a stockholder solely for the purpose of bringing the bill, that he bought his stock after the acts complained of had been begun and with notice thereof, held, that the court would not, under such circumstances, entertain his bill.[78]

Judgment creditors of an insolvent corporation sought by a bill in equity to have funds belonging to the corporation in the hands of persons made co-defendants with the corporation, applied to the payment of their judgments. Held, that the fact that

(73) Big Mountain Improvement Co.'s Appeal, 54 Pa., 361 (1867); Central Iron Works Co. *v.* Penna. R. Co., 2 Dauph. Co. R., 308 (1895); Sarver's and others Appeal, 81* Pa., 183 (1874).

(74) Tunis *v.* Hestonville, Mantua & Fairmount Pass. R. Co., 149 Pa., 70 (1892).

(75) Wheeler et al. *v.* Phila. et al., 77 Pa., 338 (1875).

(76) Pittsburgh's Appeal, 115 Pa., 4 (1886).

(77) Wolff Chemical Co. *v.* Phila., 217 Pa., 215 (1907).

(78) Anton *v.* Union Pass. Ry. Co., 54 Pa., 452 (1867).

there was no allegation that executions had been issued on their judgments and returned unsatisfied was a fatal defect.[79]

To maintain a bill in equity to enforce the rights of a corporation, a stockholder must allege and prove some sufficient reason why the corporation does not bring the suit. The fact that the stockholder *is* a stockholder must appear in the body of the bill; is not sufficient that he be so named in the title thereto.[80]

When judgment creditors agree to buy the property of their debtor at sheriff's sale, and form a corporation, taking stock therein proportioned to their credits, the corporation so formed is a necessary party defendant in a bill in equity filed by one of the creditors to compel a transfer to him of his proportion of the stock, if it appear that the corporation was formed pending the litigation, and that the stockholders were the identical creditors who had made the agreement with the plaintiff.[81]

Where the answer to a bill against a corporation filed by a subscriber to its stock recited that the subscription had been made under an agreement that the subscription should be for the benefit of another stockholder, held, that the answer was conclusive, if responsive, unless overcome by the testimony of two creditable witnesses, but that the paper filed on the incorporation of the company, together with the charter, were testimony corroborative of the plaintiff equal to that of another witness.[82]

A bill in equity by an electric light, heat and power company to secure possession of electric lighting machines, a switch-board, arc lamps, poles and wires, is demurrable on the ground that complainant has an adequate remedy at law, where there is no allegation that the complainant ever had possession of the property, the title to which it admits is denied and disputed, and there is also no allegation that the particular property mentioned in the bill is necessary to the enjoyment of the complainant's corporate franchises and privileges, that without it they cannot be exercised, or that other property of a similar kind cannot be procured for their exercise and enjoyment.[83]

(79) Suydam *v.* North Western Ins. Co. et al., 51 Pa., 394 (1865).

(80) Halton et al. *v.* New Castle Northern Ry. Co., 8 Pa. C. C., 430 (1890).

(81) Kennedy *v.* McCloskey, 170 Pa., 354 (1895).

(82) Rowley's Appeal, 115 Pa., 150 (1886).

(83) Keystone Elec. Lt., Ht. & Pr. Co. *v.* People's Elec. Lt., Ht. & Pr. Co., 200 Pa., 366 (1901).

Where a stockholder of a corporation has parted with his stock, he cannot thereafter maintain a suit against the officers of the same for an alleged illegal appropriation of its moneys as salaries, when he had knowledge of the appropriation before he sold his stock.[85]

Where the president of a corporation has openly withdrawn moneys from the corporation, a large proportion of which he used for the purposes of the corporation and the remainder for his own use, and the withdrawal of such moneys has been acquiesced in by the corporation and its stockholders for more than two years, a purchaser of the stock after the expiration of the two years from an unregistered pledgee of the stock who had participated in the transactions, and two unregistered pledgees who had knowledge of the same, have no standing to file a bill in equity against the officers and directors of the corporation to hold them personally liable for the alleged loss.[86]

Where a stockholder's bill is filed against the directors of a corporation the bill should state that it is filed not only for themselves but also for all other stockholders who may choose to join them. Where the bill omits to do this it may be amended.[87]

A bill in equity by a stockholder against a corporation, which does not clearly state whether the ground of complaint is that the board of directors has acted illegally and without authority from the shareholders, or whether the suit is directed against what is alleged to be an attempt on the part of the stockholders to empower the directors to do that which is not authorized by the charter or by law, is defective.[88]

Stockholders' bills must show that relief has been first sought of the corporate body through its board of directors, and that the same has been refused, except in cases where the acts complained of have been done by authority of the majority of the stockholders,[89] but where a majority of a board of directors have by resolution created salaried officers other than those existing under the charter and by-laws and elected themselves thereto,

(85) Rafferty *v.* Donnelly, 197 Pa., 423 (1901).

(86) Erny *v.* G. W. Schmidt Co., 197 Pa., 475 (1901).

(87) Fletcher et al. *v.* Titusville Gas & Water Co., et al., 8 Phila., 559 (1871).

(88) Chamberlain *v.* People's Bridge Co., 2 Dau. Co. Rep., 344 (1894).

(89) Chamberlain *v.* People's Bridge Co., 2 Dau. Co. Rep., 344 (1894); Erny *v.* G. W. Schmidt Co., 197 Pa., 475 (1901).

minority members of the board may file a bill to restrain such action, without first seeking relief within the corporation.[90]

A stockholder cannot maintain a bill to restrain his corporation from lending moneys to its customers on the ground that such loans are unlawful, when he has taken part as a director of the company in making such loans.[91]

608. Injunctions.

A stockholder is entitled to an injunction to restrain the officers of a corporation from the continued commission of acts which are contrary to law and may endanger the existence of the charter, where, upon affidavit exhibited upon both sides, the truth of the charges is left in doubt.[92]

Injunction will not issue where the only ground for equitable interference is the insolvency of a corporation.[93]

To warrant the granting of an injunction enjoining a railroad company from occupying a public street, the plaintiff must show that the railroad thereon is a public nuisance and that the plaintiffs have sustained special damages.[94]

A charge against a corporation for violating a public franchise being an injury common to the whole public, is a matter for the public and not for an individual to redress. The rule is, that where the injury is not greater to the plaintiff than to the inhabitants generally the remedy is with the public.[95]

A bill in equity will not lie, in the absence of a special right, to enforce the performance of public duties by a corporation. The injury to the owner of a boat incurred by the failure of a canal company to keep its canal in repair is not special.[96]

The rule that only irreparable injuries may be enjoined has no application to acts, especially corporate acts, entirely without authority, for which there is no adequate measure of damages at law, and equity will enjoin the unauthorized appropriation of a

(90) Bergdoll *v.* Bergdoll Brewing Co., 10 D. R., 173 (1901).

(91) Brophy *v.* American Brewing Co., 11 D. R., 333 (1902).

(92) Manderson *v.* Commercial Bank, 28 Pa., 379 (1857).

(93) Heilman *v.* Union Canal Co., 37 Pa., 100 (1860).

(94) Black *v.* Phila. & Reading R. Co., 58 Pa., 249 (1868).

(95) Cumberland Valley R. Co.'s Appeal, 62 Pa., 218 (1869); Buck Mountain Coal Co. *v.* Lehigh Coal & Nav. Co., 50 Pa., 91 (1865).

(96) Saylor *v.* Penna. Canal Co., 183 Pa., 167 (1897).

public road by a turnpike company, though irreparable damage may not result therefrom to any one.[97]

Injunction is a purely preventive remedy, and will not issue for past injuries. Anticipated injuries or speculative apprehensions will not warrant interference by injunction. There must be no doubt of the plaintiff's right, or the imminence of the danger threatened, before the writ will issue. Where a borough removed certain tie-rods from between the tracks of a street railway company, an injunction to restrain the borough from interfering with the company in the restoration of such rods was refused.[98]

The right to an office in a corporation will not be tried upon an application for an injunction. The proper remedy is quo warranto.[99]

609. Actions for Torts.

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are also liable for the acts of their servants . . . . in the same manner and to the same extent that individuals are liable under like circumstances: Merchants Bank *v.* State Bank, 10 Wall., 645. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance, touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence." [100]

A corporation may sustain a suit for slanderous words directed against its corporate business,[1] and actions will lie against corporations in trespass, for mesne profits [2] and for malicious prosecution [3] but in cases of suits for malicious prosecution the ex-

(97) Schuylkill Traction Co. *v.* Shenandoah, 9 D. R., 77 (1900).

(98) Groff's Appeal, 128 Pa., 621 (1889).

(99) Nolde's Appeal, 2 Mona., 169 (1888).

(100) First National Bank of Carlisle *v.* Graham (U. S. Sup. Ct.) 8 W. N. C., 361 (1880); Chestnut Hill & Spring House Tpk. Co. *v.* Rutter, 4 S. & R., 6 (1818); N. Y. & Wash. Prtg. Tel. Co. *v.* Dryburg, 35 Pa., 298 (1860).

(1) Temp. Mut. Benefit Assn. *v.* Schweinhard, 3 Pa. C. C., 353 (1887).

(2) McCready *v.* Guardians of the Poor, 9 S. & R., 94 (1822).

(3) Fenton *v.* Wilson Sewing Machine Co., 9 Phila., 189 (1874).

press precedent authority of the agent instituting the same must be shown, or a subsequent adoption and ratification by the corporation.[4]

Corporations such as telegraph, gas and other public service corporations may be liable to actions *ex delictu* for failure to render service to persons on a compliance with reasonable rules and the payment of reasonable compensation. Thus the negligent failure by a natural gas company to supply natural gas, the supply of which was suddenly cut off without notice, to the damage of the health of a customer, gives a cause of action for tortuous injury which is not dependent on a specific contract, nor defeasible by proof of the existence of a contractual relation between the parties.[5]

When through the negligence of a company a boiler explodes in its plant, another corporation having entire control of the operations of the first corporation and of its management, the officers and directors of both companies being identical, may be held liable for injuries to third persons resulting from the explosion.[6]

610. Indictment of Corporations.

"It is well recognized law that an indictment will lie against a corporation, not municipal, for the creation and maintenance of a public nuisance," [7] and a turnpike is such a public highway that its obstruction is a public nuisance. The Commonwealth may indict in such case, even where an act gives the turnpike company a specific remedy for injuries to its property.[8]

The duty to reconstruct a public highway is a public duty, the disregard and violation thereof is a public wrong, and an indictment will lie against a corporation charged with such a duty which neglects it.[9]

Judgment by default may be entered against a corporation

(4) Canon *v.* Sharon & Wheatland St. Ry. Co., 216 Pa., 408 (1907).

(5) Corbet *v.* Oil City Fuel Supply Co., 5 Pa. Super. Ct., 19 (1897).

(6) McNeil & Bro. Co. *v.* Crucible Steel Co., 207 Pa., 493 (1903).

(7) Northern Central Ry. Co. *v.* Com., 90 Pa., 300 (1879); Del. Div. Canal Co. *v.* Com., 60 Pa., 367; Chestnut Hill Tpk. Co. *v.* Rutter, 4 S. & R., 6.

(8) Northern Central Ry. Co. *v.* Com., 90 Pa., 300 (1879).

(9) Com. *v.* Penna. R. Co., 117 Pa., 637 (1887), following P. V. & C. Ry. Co. *v.* Com., 101 Pa., 192.

which has failed to enter an appearance when summoned by a writ of *venire facias* to answer an indictment for nuisance.[10]

Where an act requires that a railroad, if it find it necessary to change the site of any turnpike or public road, to reconstruct the same forthwith at its own proper expense, an indictment will lie against the railroad for failure to reconstruct within a reasonable time, as required by the act.[11]

A railroad company may be indicted for maintaining a nuisance in the shape of a dangerous crossing, and the fact that the crossing has so existed for twenty-four years is no answer.[12]

"That a corporation may be indicted for nonfeasance or misfeasance resulting in nuisances and the like is well settled, but we are not aware of any decision that has gone the length of holding that a corporation may be indicted for a crime involving the elements of personal violence and criminal intent, and none has been cited." It is liable civilly for assault and battery committed by an employe, but cannot be indicted criminally for assault and battery or manslaughter.[13]

A corporation cannot be the subject of criminal libel in Pennsylvania.[14]

611. Actions by Stockholders in the Name of the Corporation.[15]

It is not a matter of course for individual members of corporations to assume to themselves the right of suing in the name of their corporations, but if it appear that the directors of a company refuse to prosecute, by collusion with those who have made themselves amenable by their negligence or fraud, or if the corporation remain under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporators a party defendant. When stockholders are permitted to sue a corporation, and they are so numerous as to render it impossible or very inconvenient to bring them all be-

(10) Com. *v.* Lehigh Valley R. Co., 165 Pa., 162 (1895). In this case the history of judgment by default in civil cases is learnedly considered.

(11) Com. *v.* Penna. R. Co., 20 W. N. C., 448 (1888).

(12) Northern Central Ry. Co. *v.* Com., 9 W. N. C., 129 (1879).

(13) Com. *v.* Punxsutawney St. Pass. R. Co., 24 Pa. C. C., 25 (1900).

(14) Com. *v.* Cochran, 16 D. R., 313 (1906).

(15) See Secs. 201, 202, 607.

fore the court, a part of them may file a bill on behalf of themselves and others standing in the same situation.[16]

Where a corporation is unable to act by reason of the misconduct or disability of its agents, and there is not sufficient time to remove them and appoint others in their stead, the stockholders may invoke the aid of a court of equity to protect the corporate property and their own equitable right in it. But a mere refusal of the directors of a corporation, acting in good faith, to institute legal proceedings in its name to redress an alleged wrong against it, is not a sufficient ground for the interference of a court of equity at the instance of a stockholder, as it often involves the exercise of a sound discretion to determine whether it is expedient to begin litigation for an actionable injury. If, however, the directors were the authors of the wrong, or their refusal to bring suit was in excess of their discretionary powers, such interference would be justified.[17]

"The right of an individual stockholder to act for the corporation is exceptional, and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management and a refusal to act are imperative requisites. And the refusal of the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a non-performance of a manifest official obligation amounting to a breach of Trust: Beach on Private Corpn's, Sec. 878. There must be averred and proved an actual application to the directors, and a refusal by them to bring suit or to allow plaintiff to do so in the corporate name, and where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation: Beach, Secs. 882, 885. . . . . The authorities are agreed that if it sufficiently appear that a demand would be useless, it need not be made: Beach, Sec. 886." But such a condition does not sufficiently appear from an inference that, by reason of the circumstances of their election, the directors will violate their duty and commit a breach of trust. A mere averment that the lessee owned a majority of the stock of the lessor and elected its officers, who allowed themselves to be "kept in absolute ignorance of its business" is

(16) Longolf *v.* Seiberlitch, 2 Pars., 64 (1851).
(17) South W. Nat. Gas Co. *v.* Fayette Fuel Gas Co., 145 Pa., 13 (1891).

insufficient,[18] and a bill will be dismissed when the charges of fraud and collusion against the officials and former officials named as defendants are mere inferences from insufficient averments of facts.[19]

A bill to enforce the rights of a corporation must be filed by and in the name of the corporation, and, if filed by a stockholder, it must contain an averment of a demand made upon the corporation to institute a suit, and of a refusal by the corporation to do so,[20] but not where the circumstances are such that it is evident that such an application would not have availed, had it been made,[21] and generally, where the act complained of is *ultra vires* both as to the directors and stockholders, no request to the directors of the corporation is necessary, nor when the corporate management is under the control of the parties guilty of the acts complained of, but in such cases the facts which excuse the making of such demand or request must be stated with particularity and definiteness.[22]

A stockholder and creditor of a corporation filed a bill for the appointment of a receiver, alleging, inter alia, that the directors had discontinued suits for unpaid stock subscriptions against three of their number, had refused to proceed to collect certain of such subscriptions, had illegally paid large counsel fees for the company and defendants in such suits, and that the said defendants had declared that they never intended to pay such subscriptions; that the directors had paid $16,000 to a stockholder over and above the amount due him by the corporation, when he had not paid $10,000 for stock subscribed for by him, and that they refused to proceed against him for the collection of the excess wrongfully paid to him. Held, that a receiver would not be appointed in such case, the corporation being solvent, and the plaintiff having his remedy by judgment and attachment execution against the unpaid stock instalments, by stockholder's bill to

(18) Wolf *v* Pa. R. Co. and N. P. Shortridge, 195 Pa., 91 (1900); McCloskey *v.* Snowden, 212 Pa., 249 (1905). See South West Nat. Gas Co. *v.* Fayette Fuel Gas Co., 29 W. N. C., 247 (1891).

(19) McCloskey *v.* Snowden, 212 Pa., 249 (1905).

(20) Holton *v.* New Castle Ry. Co., 138 Pa., 111 (1890).

(21) Barr *v.* Pitts. Plate Glass Co., 40 Fed. Rep. 412 (1889); Shaw et al. *v.* Pa. Canal Co., 17 Phila., 107 (1884).

(22) Cook on Corpns., Secs. 741, 743.

protect the corporation and by mandamus to compel the officers of the company to do their duty.[23]

612. Actions Against Corporations by Stockholders of Associated Corporations.

A stockholder in a railroad corporation which is controlled by another railroad company has a status in equity to require the latter company to make an accounting with the former. In such a case, where there is nothing in the bill to show that the presidents of the respective corporations have any such interest as would properly make them parties, they should not be joined. The stockholder in such case must state in his bill when he acquired the stock on which his right to an accounting depends.[27]

613. Damages for Personal Injuries or Death.

The Act of April 4, 1868, P. L., 58, Sec. 2, providing that no damages shall be recovered against a railroad company in excess of three thousand dollars for causing personal injuries, and in excess of five thousand dollars for causing loss of life, was avoided by Art. 3, Sec. 21 of the Constitution of 1874. The acceptance of said act, by a corporation, did not constitute a contract with the State, because no consideration passed to the Commonwealth.[28]

614. Suits by or Against Corporations Generally.

The duty of instituting legal proceedings by or in the name of a corporation rests upon the directors, and a bill in equity in its behalf by the secretary, without their knowledge or consent, will be dismissed.[29]

In an action against a corporation upon promissory notes, appearing on their faces to be the individual notes of the persons signing them, where the plaintiff's statement alleges that the money for which the notes were given was lent to the corporation, and the persons signing were trustees of the defendant and duly

(23) Bacon *v.* Hoover Wagon Co., 13 D. R., 16 (1903).

(27) Wolf *v.* Shortridge et al. 22 Pa. C. C., 81 (1898).

(28) Penna. R. R. Co. *v.* Bowers, 124 Pa., 183 (1889); over-ruling Penna. R. R. Co. *v.* Langdon, 92 Pa., 21; Lewis *v.* Hallahan, 103 Pa., 425 (1883).

(29) Weir Furnace Co. *v.* Auschutz-Bradberry Co., 10 D. R., 81 (1901).

authorized to execute and deliver the notes in question, the suit can be maintained against the corporation, if the allegations be proven; and an averment in the affidavit of defense that the notes in suit appear upon their faces to be the individual notes of the makers thereof, and that the corporation cannot be held upon them, is not a denial of the averments of the statement and is insufficient to prevent judgment.[30]

A recovery in trespass against the officers and agents of a corporation is not evidence against the corporation without proof of privity.[31]

On a bill in equity, brought by a corporation, the plaintiff is entitled to relief against wrongs committed before the issue of its letters patent, if there were no such tardiness in organizing as forfeited the privileges given by the charter.[32]

Stockholders may, by bill in equity, restrain a corporation from illegal acts that might injuriously affect their investment or result in a default in their dividends, and an alternative mandamus will be issued in aid of such bill, but a bill of discovery will not extend to matters entirely within the jurisdiction of the directors, such as the payment of salaries.[33]

A minority stockholder filed a bill to set aside an alleged fraudulent contract made between her company and another, joining as parties defendant the two corporations and the persons holding a majority of the stock in each company, alleging that she was induced to vote for the contract by misrepresentation and charging that her company had been wrongfully deprived of profits through their appropriation by the other company, and that defendants proposed to transfer the business of the first to the second company. The court decreed the appointment of a receiver, and enjoined the officers from dismantling the plant of the first company or materially changing its condition until final hearing. Held, that so much of the decree as related to the appointment of a receiver should be reversed, the remainder of the decree to be affirmed, but in such manner as to permit the officers of the company to

(30) Wanner *v.* Emanuel's Church, 174 Pa., 466 (1896).
(31) Goundie *v.* Northampton Water Co., 7 Pa., 233 (1847).
(32) Koons *v.* Steele, 19 Pa., 203 (1852).
(33) Marshall *v.* American Caramel Co., 9 D. R., 152 (1900).

operate its plant and remove its superintendent and other employes as they should see fit.[34]

In a creditor's bill filed against a corporation, a mere reference in the caption of the bill to the plaintiff as creditor is insufficient. There must be a specific averment in the bill itself of the facts showing the plaintiff's interest in the subject matter of the suit.[35]

A stockholder of a mining company who has filed a bill in equity to restrain a lease of the company's land, may make a valid contract with the lessee by which, in consideration of his discontinuing the suit, he is to receive from the lessee a bonus for every ton of coal mined by the lessee, and, if the circumstances remain the same, the fact that the stockholder becomes a director will not affect his right to receive such bonus.[36]

Corporations are subject to attachment under the Fraudulent Debtors Act of March 17, 1869, P. L., 8. [37]

615. Minutes of Boards of Directors Conclusive on Corporations.

In a suit against a corporation the minutes of the board of directors are conclusive against it, and testimony is inadmissible on its behalf to prove that certain individual directors understood that the corporation was not to be bound by a resolution as written.[38]

A bill of discovery will lie as well against a corporation as an individual, under the Act of 16 June, 1836, and the remedy extends to all the estate of the defendant in the judgment, of every description, whether it consists of real or personal estate, goods and chattels, choses in action, or, in the language of the act, money due or to become due.[39]

616. Mandamus Against Corporations and Their Officers.[40]

Writs of mandamus addressed to corporations and their officers may be issued under the provisions of the Act of June 8, 1893,

(34) Devine *v.* Frankford Steel & Forging Company, 205 Pa., 114 (1903).
(35) Holton *v.* New Castle Northern Ry. Co., 138 Pa., 111 (1890).
(36) Bird Coal & Iron Co. *v.* Humes, 157 Pa., 278 (1893).
(37) Mechanics' Nat. Bank *v.* Miners' Bank, 13 W. N. C., 515 (1883).
(38) Bevans *v.* Dingman's-Choice Tpk. Co., 10 Pa., 174 (1849).
(39) McGowan *v.* Lincoln Park & Steamboat Con. Co., 181 Pa., 55 (1897).
(40) See Secs. 128, 129, 132, 521.

P. L., 345, the first section of which is amended by the Act of April 28, 1899, P. L., 84.

A writ of mandamus to compel the officers of a corporation to perform their duties must join the corporation as defendant.[41]

Under the Act of June 14, 1836, P. L., 626, a Court of Common Pleas could not issue mandamus to a railroad company whose office and chief place of business was not in such county, though the road might pass through the same.[42] To remedy this the Legislature passed the Act of March 15, 1847, P. L., 361. The mandamus Act of May 25, 1881, P. L., 32—now superseded by the Act of June 8, 1893—does not repeal the Act of March 15, 1847. Hence a writ of mandamus may be issued from the county in which the works of a company are situated, and served on a director residing in an adjoining county.[43]

Mandamus proceedings may be instituted against a railroad company having its principal office in Philadelphia, but having its railroad wholly within Clearfield county, where its operating officers reside either in Philadelphia or Clearfield county.[44]

Mandamus is the proper and appropriate remedy to compel a municipal corporation to make provision for the payment of interest due upon bonds issued by it in payment of a subscription to the stock of a railroad company, by the assessment and collection of the necessary taxes.[45]

A mandamus to compel the transfer of stock will not be granted where the relator has an adequate remedy in an action on the case for damages.[46]

A mandamus will not be granted to compel the body in which corporate powers are vested to affix their common seal to alterations and amendments to their charter, contrary to their own judgment.[47]

(41) Com. ex rel. Boas *v.* Coit et al., 15 W. N. C., 270 (1884); Com. *v.* Reeves et al., 13 W. N. C., 45 (1884). *Contra,* Com. *v.* Keim, 38 Leg. Int., 62 (1881); 15 Phila., 1.

(42) Whitemarsh Township *v.* P., G. & N. R. Co., 8 W. & S., 365 (1845).

(43) Com. *v.* N. Y., Pa. & O. R. Co., 138 Pa., 58 (1890).

(44) Loraine *v.* Pgh., Johnstown, E. & E. R. R. Co., 205 Pa., 132 (1903).

(45) Com. *v.* Perkins, 43 Pa., 400 (1862); Com. *v.* Pittsburg, 34 Pa., 496 (1859).

(46) Birmingham Fire Ins. Co. *v.* Com., 92 Pa., 72 (1879).

(47) Com. *v.* Trustees of Church of St. Mary's, 6 S. & R., 508 (1821).

617. Pleadings.

In an action by a corporation a plea "that there is not, nor on the day of the purchase of the writ, nor ever since, was there any such corporation" is a plea in bar, and not in abatement. But to be a good plea in bar it should have set forth that there never was such a corporation.[48]

The answer of a corporation sworn to by the proper officer having personal knowledge of the facts, is within the equity rule as to the weight of a responsive answer as evidence. The rule requires that the officer making oath to the answer, to give it responsive force, must be one having knowledge of the facts, and such answer may be overcome only by testimony of two witnesses, or of one witness and corroborating circumstances.[49]

After pleading to a narr. charging them as a corporation, and going to trial as such in the Common Pleas, the defendants cannot, on a writ of error, take advantage of the suit having been begun against them, before a justice of the peace, in their individual characters.[50]

When pleadings are signed by an officer of a corporation it should be in such a manner as to indicate what office he holds.[51]

618. Oaths in Cases of Appeal.

In every case in which an appeal is taken to the Supreme Court or Superior Court, such appeal shall be entered in the court to which the appeal is taken; and filed with the same shall be an affidavit of the parties appellant, or some one of them, or of one of their chief officers or of their agent or attorney, that said appeal is not taken for the purpose of delay but because appellants believe they have suffered injustice by the sentence, order, judgment or decree from which they appeal. Such affidavit may be made before any one authorized to administer oaths.[52]

(48) Northumberland County Bank *v.* Eyer, 60 Pa., 436 (1869). See Sec. 45.

(49) Kane *v.* Schuylkill Fire Ins. Co., 199 Pa., 198 (1901); Gantt *v.* Cox & Sons' Co.. Id., 208 (1901).

(50) Overseers of the Poor, etc. *v.* Bunn, 12 S. & R., 292 (1825).

(51) Merchants' Nat. Bank *v.* Brooks, 6 Pa. C. C., 314 (1888).

(52) Sec. 1, Act of May 19, 1897, P. L., 67. Sec. 22 of said act repeals Sec. 4, of the Act of March 22, 1817 (6 Sm. Laws, 438), which provided specifically for oaths of officers of corporations in cases of appeal.

619. Bail on Appeal.

The Act of May 19, 1897, P. L., 67, seems to repeal and supersede all the numerous prior statutes relative to appeal, and the fifth section thereof provides for the giving of bail on appeal. The following relates to acts repealed by said Act of 1897:

The Act of March 22, 1847, Sec. 4, provides that "when any corporation shall be sued and shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest and costs, on affirmance of the judgment."

The Act of March 20, 1845, Sec. 1, provides "That in lieu of the bail heretofore required by law, in the cases herein mentioned, the bail in cases of appeal from the judgments of aldermen and justices of the peace and from the awards of arbitrators, shall be bail absolute in double the probable amount of costs accrued and likely to accrue in such cases, with one or more sufficient sureties, conditional for the payment of all costs accrued or that may be legally recovered in such cases against the appellants."

The Act of March 15, 1847, Sec. 1, P. L., 361, provides that "Whereas doubts have arisen in regard to the effect of the first section of the act . . . . passed March 20, 1845, and as to the bail required to be given by corporations in cases of appeal and writs of error, since the passage of said act, therefore: Sec. 1. Be it enacted, etc. That from and after the passage of this act, when any corporation (municipal corporations excepted) being sued shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of debt, interest and costs, on the affirmance of the judgment."

By the Act of March 21, 1849, Sec. 3, P. L., 216, it was provided "That in all suits or actions hereafter to be brought in any court of record of this Commonwealth, against any foreign corporation, or body corporate, not holding its charter under the laws of this Commonwealth, every judgment, verdict or award against such corporation shall be final and conclusive, unless the said defendant, in addition to the usual proceedings in cases of appeal, shall give good and sufficient bail, in the nature of bail absolute, for the payment of such sum or sums as shall finally be adjudged to be due to the plaintiff or plaintiffs, together with interest and costs thereon."

The Act of April 25, 1850, Sec. 12, P. L., 571, provided "That

so much of the first section of the act passed the 20th day of March, 1845, ... as pertains to appeals from awards of arbitrators shall from henceforth be construed to extend to all such appeals whether made by persons natural or artificial."

In O'Connell *v.* N. Y., L. E. & W. R. Co., 17 Pa. C. C., 125, (1895) from whence the foregoing citations were taken, it is held that the Act of April 25, 1850, repeals all antecedent legislation requiring a corporation, whether foreign or domestic, to give bail for more than costs, as required in the Act of 1845, on an appeal from an award of arbitrators, and only on such an appeal. In a later case, however, it was held that in such case the corporation appealing must give bail absolute for debts, interest and costs.[53]

The Act of March 15, 1847, P. L., 361, regulates not only appeals in writs of error to the Supreme Court, but relates as well to appeals from justices of the peace, unaffected by the later acts of March 21, 1849, P. L., 216, and April 25, 1850, P. L., 571. The first of these relates only to foreign corporations, in suits brought in courts of record, while the twelfth section of the later act concerns only appeals from awards of arbitrators. Hence a corporation, not municipal, on an appeal from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs as provided in said Act of 1847.[54]

In cases of appeals from awards of arbitrators, however, bail for costs, only, will be required and not for the amount of the debt.[55]

620. Suits Against Domestic Corporations Instituted in Other States.

A judgment upon a warrant of attachment issued in the State of New York against a Pennsylvania corporation, which was not served upon the defendant, and to which the defendant never appeared or pleaded, will not sustain an action against the defendant in the courts of Pennsylvania. Service by publication cannot give the court out of which such process issued jurisdiction to render a judgment *in personam* against a non-resident defendant. Judgment upon such service binds only property within the jurisdiction of the court.[56]

(53) Pinks *v.* Rimersburg Gas Co., 18 Pa. C. C., 339 (1896).

(54) Young *v.* Colvin, 168 Pa., 449 (1896), citing Rush *v.* Home Mut. Life Assn., 4 Pa. C. C., 523.

(55) O'Connell *v.* Railroad Co., 5 D. R., 105 (1895).

(56) Paltrowitz *v.* Lucknow Iron & Steel Co., 9 Dau. Co. Rep., 53 (1906); 32 Pa. C. C., 78; 15 D. R., 738.

CHAPTER XXVI.

EXECUTIONS.

AGAINST STOCK:—

621. Executions Against Stock Held in the Owner's Name.

622. Attachment before Judgment of Stock Held in the Name of Another than the Real Owner.

623. Execution Against Stock Held in the Name of Another than the Real Owner.

624. Persons Claiming to Own Stock Attached as Property of Defendants May Become Parties.

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AGAINST CORPORATIONS:—

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638. Executions to Enforce Decrees in Equity.

639. Foreign Attachments Against Corporations.

640. Discovery of the Effects of a Corporation.

641. Stay of Execution.

621. Executions Against Stock Held in the Owner's Name.

The stock owned by any defendant in any body corporate, also deposits of money in any bank, or with any person or body corporate or politic, belonging to him, and debts due to him, shall be liable to execution, like other goods or chattels, subject, nevertheless, to all lawful claims thereupon, of such body corporate or person.[1]

The stock of any body corporate owned by any individual or

(1) Sec. 22, Act June 16, 1836, P. L., 755.

individuals, body or bodies politic or corporate, in his, her, its or their own name or names, shall be liable to be taken in execution and sold, in the same manner that goods and chattels are liable in law to be so taken and sold, subject, nevertheless, to any debt due by the holder or holders of such stock to the company or body corporate.[2]

622. Attachment Before Judgment of Stock Held in the Name of Another Than the Real Owner—Act of March 29, 1819.

And, whereas, it sometimes happens, that the stock of such bodies corporate is held in another name or names than that of those of the real owner or owners thereof, and it is just that stock so held should be made liable for the debts of the real owner or owners: Therefore, whenever any plaintiff or creditor shall file an affidavit with the prothonotary of the court, alderman or magistrate, in which or before whom such plaintiff or creditor has instituted or is about to institute a suit, stating that he verily believes such stock to be really and *bona fide* the property of the debtor against whom such suit has been or is about to be brought, and also shall enter into a recognizance, with two sufficient sureties, conditioned for the payment of such damages as such court, alderman or magistrate may adjudge, to the party or parties to whom such stock shall really belong, in case such stock should not be the property of such debtor, it shall and may be lawful for such court, alderman or magistrate to cause to be issued process in the nature of a foreign attachment against such stock, and to summon as garnishee the person or persons in whose name or names the same shall be held, and proceed against the said stock and such garnishee, in all respects in the same manner as by the laws of this Commonwealth proceedings now are or hereafter may be prescribed in cases of foreign attachments against personal estate; and upon judgment being had in favor of the plaintiff in any such suit, execution may issue immediately for the sale of such stock, in the same manner that goods and chattels are sold on writs of fieri facias: *Provided,* That in case of a judgment before a justice of the peace or alderman, where the amount in controversy shall exceed five dollars and thirty-three cents, an appeal shall be allowed to the Court of Common Pleas, agreeably to

(2) Sec. 2, Act March 29, 1819, 7 Sm. Laws, 217.

the same rules and regulations now or hereafter to be prescribed for granting appeals in other cases cognizable before a justice of the peace.[3]

623. Execution Against Stock Held in the Name of Another Than the Real Owner—Act of June 16, 1836.

The proceedings to levy an execution upon stock, debts and deposits of money belonging or due to the defendant, shall be as follows, to-wit: In the case of stock, if it shall be held in another name than that of the real owner thereof, the plaintiff shall file in the office of the prothonotary of the court, an affidavit stating that he verily believes such stock to be really the property of the defendant, and shall enter into recognizance with two sufficient sureties, conditioned for the payment of such damages as the court may adjudge, to the party to whom such stock shall really belong, in case such stock should not be the property of the defendant.[4]

Upon the filing of such an affidavit and recognizance, it shall be lawful for the prothonotary to issue process in the nature of an attachment, against such stock, with a clause of summons to the person in whose name the same may be held, in the nature of a writ of scire facias against garnishees in a foreign attachment; and thereupon the plaintiff may proceed to judgment, execution and sale of the said stock, in the manner allowed in cases of foreign attachment against personal estate.[5]

624. Persons Claiming to Own Stock Attached as Property of Defendants May Become Parties.

The like proceedings may be had against stock owned by a defendant, and held in his own name, without the affidavit and recognizance aforesaid; and if any person shall claim to be the owner of such stock, he may, upon filing an affidavit that the stock is really his property, and entering into a recognizance with two sufficient sureties, conditioned for the payment of such damages as the court may adjudge to the plaintiff, if such stock should really belong to the defendant, the court shall admit him to be-

(3) Sec. 3, Act March 29, 1819, 7 Sm. L., 217.
(4) Sec. 32, Act June 16, 1836, P. L., 755.
(5) Sec. 33, Act June 16, 1836, P. L., 755.

come a party upon the record, and take defense in like manner as if he were made garnishee in the writ.[6]

625. Decisions Relative to the Acts of 1819 and 1836.

The second section of the Act of March 29, 1819, is not repealed by the Act of June 16, 1836. It provides for the taking in execution of stock held by the holder in his own name. The thirty-second and thirty-third sections of the Act of 1836 provide for a remedy which *shall* be pursued by the creditor who desires to reach stock owned by his debtor but standing in the name of another. The thirty-fourth section provides a remedy where the stock stands in the name of the debtor *but is claimed by another.*[7]

"Lex *v.* Patten, (Potters) 4 Harris (16 Pa.) 295, does not decide that stock held by a defendant in his own name, and not claimed by another, cannot be attached in execution under the thirty-fourth section of the Act of June 13, 1836. It decides only that such stock *may* be sold under the first section of the Act of March 29, 1819, and this section of the Act of 1819 is not repealed by the thirty-fourth section of the Act of 1836. The right to proceed under the latter, *if the parties choose,* is express. . . . . There is a reason why the attachment is an appropriate proceeding under the Act of 1836. . . . . There are cases where stock is held by a defendant in his own name, and where there is no owner to make claim, but where it is subject to a charge or lien on the title. . . . . In such cases it is important to the rights of the parties that the proceedings by attachment should be resorted to, and the precise extent and character of the claim . . . . ascertained before final execution; but, if the stock should be levied and sold under a fi. fa. the result must be litigation between the purchaser and the corporation and a loss to one party or the other." [8]

The third section of the Act of March 21, 1819, and the thirty-second section of the Act of 1836, both provide for the attachment of stock held in the name of another than the real owner. "But the Act of 1836 differs from the Act of 1819 in this, that by the latter the writ issued is a judicial act: 'It shall and may be lawful for such court, alderman or magistrate to

(6) Sec. 34, Act June 16, 1836, P. L., 755.
(7) Lex *v.* Potters, 16 Pa., 295 (1851).
(8) Weaver *v.* Huntingdon, etc., R. & Coal Co., 50 Pa., 314 (1865).

cause to be issued process in the nature of a foreign attachment,' whilst in the former the act is ministerial: 'Upon the filing of such affidavit and recognizance it shall be lawful for *the prothonotary* to issue process in the nature of an attachment.'"[9]

Where the stock stands on the books of the corporation in the name of the real owner, it may be taken and sold upon an execution had against him, in the same manner that goods and chattels are liable to be taken and sold; but when held in the name of another, process in the nature of a foreign attachment is required to be first issued against the stock, and the person in whose name it shall be so held be summoned as garnishee, after which like proceedings thereon are directed as in the case of a foreign attachment.[10]

Shares of stock standing in the name of a defendant in execution are not liable to be sold as his, under the Act of March 29, 1819, if they are actually the property of another. A sold certain shares of stock, taking from the purchaser a promissory note for the price of the same, and executed at the time of sale a power of attorney for the transfer of the stock. Fourteen days afterwards a levy was made upon the stock, which had not been transferred on the books of the company. Held, that the stock was not liable to levy under the execution, although the rules of the bank issuing the stock required transfers to be made in the presence of an officer of the bank.[11]

Stock owned by a defendant and held in his own name may be reached either by levy and sale under the Act of 1819, or by attachment execution.[12] Stock belonging to a defendant, but not held in his own name, can be reached only by attachment execution.[13]

Stock standing in the name of the defendant is not liable to execution, if it be actually the property of another.[14]

Stock assigned as collateral cannot be sold on a fi. fa. It must be sold under attachment execution.[15]

(9) Eby *v.* Guest, 94 Pa., 160 (1880).

(10) Com. *v.* Watmough, 6 Whart., 117 (1840).

(11) Com. *v.* Watmough, 6 Whart., 117 (1840).

(12) Lex *v.* Potters, 16 Pa., 295 (1851); Bonaffon *v.* Wyoming Canal Co., 4 Phila., 29; Weaver *v.* Huntingdon, etc. R. & Coal Co., 50 Pa., 314 (1865).

(13) Weaver *v.* Huntingdon, etc. R. & Coal Co., 50 Pa., (1865) 314; Early's Appeal, 8 Luz. L. Reg., 160.

(14) Com. *v.* Watmough, 6 Whart., 117.

(15) Eby *v.* Guest, 94 Pa., 160 (1880).

Stock that has been sold, but not actually transferred upon the books of the corporation issuing the same, cannot be reached by attaching creditors of the transferer.[16]

626. How Executions Against Corporations Shall be Levied.

All executions which shall be issued from any court of record, against any corporation, not being a county, township or other public corporate body, shall command the sheriff or other officer, to levy the sum recovered, together with the costs of suit, of the goods and chattels, lands and tenements of such corporation, and such execution shall be executed in the manner following, to-wit:

I. The officer charged with the execution of such writ shall go to the banking houses, or other principal office of such corporation, during the usual office hours, and demand of the president or other chief officer, cashier, treasurer, secretary, chief clerk or other officer having charge of such office, the amount of such execution, with legal costs.

II. If no person can be found on whom demand can be made as aforesaid, or if the amount of such execution be not forthwith paid in lawful money, after demand as aforesaid, such officer shall seize personal property of said corporation, sufficient to satisfy the debt, interest and costs as aforesaid.

III. If the corporation against which such execution shall be issued by a banking company, and other sufficient personal property cannot be found, such officer shall take so much of any current coin, of gold, silver or copper, which he may find, as shall be sufficient to satisfy the debt, interest and costs, as aforesaid.

IV. If no sufficient personal property be found, as aforesaid, such officer shall levy such execution upon the real estate of such corporation, and thereupon proceed in the manner provided in other cases for the sale of land upon execution.[17]

627. Sequestration.

It was held in an early case [18] that the property of quasi public corporations essential to the exercise of their franchises could not be taken in execution, and in that case Chief Justice Tilghman sug-

(16) Com. *v.* Watmough, 6 Whart., 117 (1840); Finney's Appeal, 59 Pa., 398 (1868); U. S. *v.* Vaughan, 3 Binn., 394 (1811).

(17) Sec. 72, Act June 16, 1836, P. L., 774.

(18) Ammant *v.* Tpk. Co., 13 S. & R., 210.

gested that legislation should be passed providing for the sequestration of the revenues of such corporations to secure the payment of judgments against them, where they had not a sufficient amount of property not essential to the exercises of their franchises upon which the amounts of the executions could be levied. Such legislation was provided by the Act of June 16, 1836, P. L., 755.[19] The method of sequestration provided for by the Act of 1836 seems to have been abolished and done away with by the Act of April 7, 1870, P. L., 58, under which latter act the franchises and property of a corporation may be seized and sold under a fi. fa.[20]

Clause 8, of Sec. 30, of the Act of April 29, 1874, P. L., 89, provides, however, for the appointment of sequestrators of turnpike companies, as provided in the Act June 13, 1836.

628. Sale of Property and Franchises of Corporations—Act of April 7, 1870 (P. L. 58).

In addition to the provisions of the sixty-second [seventy-second] section of the Act of the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six, relating to executions, and in lieu of the provisions or proceedings by sequestration under said act, plaintiff or assigns, in any judgment against any corporation not excepted by said act, may have execution fieri facias issued from the court wherein said judgment is entered, which shall command the sheriff or other officer to levy the sum of said judgment, with interest and costs of suit, of any personal, mixed or real property, franchises and rights of such corporation, and thereupon proceed and sell the same, excepting lands held in fee, which latter shall be proceeded against and sold in the manner provided in cases for the sale of real estate; the proceedings on judgment under the aforesaid provisions of this supplement shall be without stay of execution: *Provided*, That the purchaser or purchasers of any or all of said property, real, personal or mixed, together with the franchises and rights, shall take the same clear of all incumbrances, excepting any mortgage or mortgages which may legally exist at the time of levy thereupon, the lien of which shall not be affected in any manner by said sale.

(19) Susquehanna Canal Co. *v.* Bonham, 9 W. & S., 27.
(20) Phila. & Balto. Central R. Co.'s Appeal, 70 Pa., 355 (1872).

629. Levy May be Made in Any County of the Commonwealth.

By virtue of any execution, issued under this act, the levy may extend to the property, franchises and rights of said corporation, in any and every county of this Commonwealth, wherein the same may be, and shall be endorsed on said writ; the levy and sale thereof shall be as effective as though all said property, franchises and rights were located, used, levied upon and sold in the county wherein said writ of execution was issued, and shall fully divest the defendants of all interest therein.[20*]

"Having in view the old law (the common law) the mischief and the remedy, we hold the Act of 1836 relative to fi. fa.'s, issued on judgments against public corporations, authorizes the sheriff to serve his writ, and make demand at the principal office of the corporation, wherever the principal office may be situated within the Commonwealth."[21]

630. The Provisions of the Act of April 7, 1870, Are in Addition to the Provisions of Section 72, Act of June 16, 1836.

"Prior to the passage of the Act of April 7, 1870, the franchises of a public corporation and its real and personal property appropriated to corporate objects and necessary to the exercise of its corporate functions were exempt from levy and sale on execution. The remedy of its creditors against such property was by sequestration. But property, real or personal, not devoted or essential to the purposes of the corporation might be levied on and sold pursuant to the provisions of the seventy-second section of the Act of June 16, 1836. The Act of 1870 provided for the levy and sale, on execution, of the real, personal and mixed property (excepting lands held in fee) franchises and rights of the corporation, subject to any mortgages existing thereon. It was expressly declared to be in addition to the provisions of the sixty-second [seventy-second] section of the Act of 1836, relating to executions and in lieu of the provisions or proceedings by sequestration under said act. . . . . We think, therefore, that the exception in the Act of 1870 is limited to the land which the corporation

(20*) Sec. 2, Act April 7, 1870, P. L., 58. In Hassall *v.* Union Canal Co., 2 Pa. C. C., 147 (1884), it was held that where there is no property of the corporation in the county in which the writ issues, there can be no levy upon the property of the company in other counties.

(21) Smith *v.* Altoona & Phillipsburg Connecting R. Co., 182 Pa., 139 (1897).

holds in fee, and which is not dedicated to corporate purposes or essential to the exercise of the corporate franchises."

A right to take gas from the land, or water from the spring of another for private consumption, is not land held in fee and the appliances and privileges necessary to the enjoyment of the right are not.[22]

631. When an Ordinary Fi. Fa., Under the Act of 1836, Must Precede the Special Fi. Fa., Under the Act of 1870.

The provisions of the Act of April 7, 1870, are in addition only to the provisions of the seventy-second section of the Act of 1836, and there can be no writ to sell the franchises or corporate property until after a return under the first fi. fa. Under the Act of 1836 everything not essential to the exercise of the franchises of the company could be taken under a fi. fa.; the rest must be sequestered. Now a fi. fa. must issue against the non-essential property of the company, before the special fi. fa. under the Act of 1870, can issue against the franchises, etc.[23]

There must be a fi. fa. issued under the Act of 1836, in the case of quasi public corporations, a return of *nulla bona* or a failure of satisfaction of the debt before a special fi. fa. can issue, under the provisions of the Act of 1870.[24]

When the property of a quasi public corporation essential to the exercise of its franchise is sought to be levied on upon an ordinary fi. fa., the execution will be set aside if made at a proper time, but it is not void, and though not preceded by a return of *nulla bona*, it will not, after an acquiescence of several years, be set aside in a collateral proceeding.[25]

"The return by the sheriff that his writ [original fi. fa., under the Act of 1836] was unpaid, while it did not, beyond question establish the insolvency of the corporation, did establish that all the property of the corporation was out of the reach of the credi-

(22) Greensburg Fuel Co. *v.* Irwin Nat. Gas Co., 162 Pa., 78 (1894); Westmoreland Nat. Gas Co. *v.* DeWitt, 130 Pa., 249 (1890).

(23) Reynolds *v.* Reynolds Lumber Co., 169 Pa., 626 (1895); Guest *v.* Merion Water Co., 142 Pa., 610 (1891); Mausel *v.* N. Y., C. & St. L. R. Co., 171 Pa., 606 (1895).

(24) Guest *v.* Merion Water Co., 142 Pa., 610 (1891); Flagg *v.* Farnsworth, 12 W. N. C., 500 (1883); Valle Bros. & Co. *v.* Arnold Elec. Mfg. Co., 17 Pa. C. C., 33 (1894); and cases cited in preceding note.

(25) Lusk's Appeal, 108 Pa., 152 (1884).

tor except the franchise, and now the way was open to get at that by sequestration. . . . . Nor can the special fi. fa. . . . . under the Act of 1870, issue without the precedent service of fi. fa., and demand at the principal office, issued under the Act of 1836." If that principal office be outside of the county in which the suit is brought, the sheriff of said county must, nevertheless, serve his writ and make demand at such principal office.[26]

If the special fi. fa. be issued without a demand first having been made upon the officers of the corporation, and without a levy having been made upon the personal property of the company, in the case of a quasi public corporation, the writ will be stayed.[27]

When the property of a private corporation has been sold under a special fi. fa., without a return of "nulla bona," and no allegation of insolvency at the time of service, and all the property except the franchise is included in the sale, distribution will be made among the judgment creditors in the order of their priority; the execution will be assumed to have issued under the Act of 1836 and not the Act of 1870, and the fact that property necessary to the transaction of their business was sold will not bring them within the terms of the latter act.[28]

A sale under a special fi. fa. does not work a dissolution of the corporation so as to prevent its officers from afterwards admitting bankruptcy, and is itself an act of bankruptcy under Sec. 3, Div. 4, of the Bankruptcy Act, in that the sheriff is practically a trustee in charge of the property. The Act of April 7, 1870, P. L., 85, is a State insolvency act and when its effect is to defeat the object of the provisions of the Bankruptcy Act, it must yield thereto.[29]

The land which is a component part of the plant of an incorporated water company, and is necessary to the enjoyment of the corporate franchises, may be sold on the special writ of fi. fa. provided by the Act of April 7, 1870, P. L., 58.[30]

Under the provisions of the Act of April 17, 1870, a sheriff has no power, upon a special fi. fa. directed against a corpora-

(26) Smith *v.* Altoona & Phillipsburg Connecting R. Co., 182 Pa., 139 (1897).

(27) Mausel *v.* N. Y. C. & St. L. Ry. Co., 171 Pa., 606 (1895).

(28) Valle Bros. *v.* Arnold Elec. Mfg. Co., 17 Pa. C. C., 33 (1894).

(29) In re International Coal Mining Company, 15 D. R., 669 (1906).

(30) Bell et al. *v.* R. D. Wood & Co., 181 Pa., 175 (1897).

tion, to levy upon property outside his own county, except where the corporation has property within such county.[31]

632. No Special Fi. Fa. is Required in Executions Against Purely Private Corporations.

In the case of purely private corporations, in the operations of which or the rights concerning them the public have no direct interest, their property may be levied on under an ordinary fi. fa., in the same manner as the property of an individual. It is only in the case of quasi public corporations that there must first be a fi. fa., under the Act of 1836, applicable to personal property not essential to the operations of the company, a return of *nulla bona*, or failure of satisfaction of debt, and a special fi. fa. under the Act of 1870.[32]

633. Notification by Sheriffs to Auditor General of Executions Against Corporations.

Hereafter when any writ of execution is placed in the hands of any sheriff in this Commonwealth, for the purpose of selling the property or franchises of any corporation, limited partnership or joint stock association, it shall be the duty of such sheriff forthwith to notify the Auditor General, furnishing him information as follows:

First. Name of the corporation, limited partnerships or joint-stock association, defendant.

Second. Name of the plaintiff in the writ of execution.

Third. Nature of property levied upon and to be sold, and location of same.

Fourth. The time when the property or franchise will be sold, and the return day of the writ upon which sale will be made.

For the services herein directed to be performed, the sheriff is hereby authorized to tax, and collect as cost in the writ of execution against said corporation, limited partnerships, or joint-stock associations, the sum of two ($2.00) dollars: *Provided, however,* That when more than one writ is made returnable to any one return day, the costs hereinbefore allowed shall only be taxed upon one writ of execution.[33]

(31) Chester Pipe & Tube Co. *v.* Saltsburg Gas Co., 8 D. R., 427 (1899).

(32) East Side Bank *v.* Columbus Tanning Co., 170 Pa., 1 (1895); Reynolds *v.* Reynolds Lumber Co.; Roy's Appeal, 169 Pa., 626 (1895).

(33) Act May 29, 1901, P. L., 344.

634. Execution Sales.

The sale by a sheriff of the property and franchises of a railroad company does not pass to the purchaser the debts or mere choses in action due the company from others. A was indebted to a railroad company for $5,000 subscription to stock. The company owed him $2,000. The property and franchises were sold at sheriff's sale on a judgment obtained against the company by B. In distributing the proceeds of the sale among the creditors, held, that A was not entitled to share in the distribution.[34]

A stockholder's petition to have a sheriff's sale of the corporate franchises and property set aside, failing to aver when the petitioner became a stockholder and the amount of his holding, and to charge collusion, misconduct or inability to act on the part of the directors, is defective. Moreover, a refusal to set aside such a sale is not reviewable by the Supreme Court.[35]

Under the Act of April 20, 1846, P. L., 412, relating to sheriff's returns, where the execution creditor purchases the property and franchises of a corporation, a creditor whose debt is a judgment subsequent in date to the mortgage upon which the execution proceedings were conducted, has no standing to except to the sheriff's return. It seems that if the mortgage was invalid and collusive, the property of the defendant in the execution is not divested by the sale as against a *bona fide* creditor; if valid, the petitioner cannot attack the incorporation of the company nor the creation of the mortgage indebtedness.[36]

By a judgment and execution thereon all the franchises and property of a corporation were sold, subject to a certain mortgage given to secure an issue of bonds. Upon the reorganization of the corporation under the same name, certain creditors obtained judgments against the original corporation, and proceeded to execution and sale in the manner provided for by the resolution of January 21, 1843, and its supplement, approved April 4, 1862. Held, that the first sale extinguished the original corporation, and that the second sale, being founded upon a judgment void by rea-

(34) Hogg's Appeal, 6 W. N. C., 377 (1878).

(35) South West Nat. Gas Co. *v.* Fayette Fuel Gas Co., 145 Pa., 13 (1891). See Creighton & Burch *v.* Scranton Lace Curtain Mfg. Co., 191 Pa., 231 (1899).

(36) Mellon *v.* Shenango Nat. Gas Co., 157 Pa., 627 (1893).

son of being against a non-existent corporation, did not divert the lien of the mortgage.[37]

A sheriff's sale of the charter rights, privileges, franchises and assets of every description of a corporation, by virtue of a special fi. fa. under the provisions of Sec. 1 of the Act of April 7, 1870, does not work a dissolution of the corporation.[38]

Such a sale does not seem to constitute an act of bankruptcy under Sec. 3, sub-division 4 of the Bankruptcy Act.[39]

A chose in action may not be taken in execution on a fi. fa., the only process of reaching it being an attachment execution under the Act of June 16, 1836, Sec. 32, P. L., 755. Hence a sheriff's sale upon a special fi. fa. under the Act of 1870, of the property, franchises and rights of a corporation will not pass to the sheriff's vendee a claim of the corporation against a railroad company for an unlawful discrimination in freight rates.[40]

Property of corporations may not be sold at execution sale until all State taxes have first been paid to the Commonwealth.[41]

635. Distribution of Proceeds of Sales Under the Special Fi. Fa.

The case of Hopkins' and Johnson's Appeal, 90 Pa., 69 (1879) seems to hold that, under the provisions of Sec. 1 of the Act of April 7, 1870, where there is a sale of the personal property of an insolvent corporation, no preference is to be given to execution creditors, but the distribution must be made as in cases of insolvency. In a later case,[42] however, the court say that this case "decides no question touching the distribution by law of the proceeds of the sale of corporate property."

"The proceeds of the property, whether real or personal, sold upon the first or ordinary fi. fa., or upon a vend. ex., based upon it, are to be distributed in the ordinary way to the lien creditors,

(37) Reynolds *v.* Cridge, 11 Pa. C. C., 306 (1893).

(38) In re International Coal Mining Co., U. S. Dist. Ct., 15 D. R., 669 (1906); U. S. Circ. Ct. Ap., 16 D. R., 212 (1906). *Contra* Reifler *v.* Honesdale & Del. Plank Rd. Co., 1 Pa. C. C., 64 (1886). See Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869).

(39) In re International Coal Mining Co., U. S. Dist. Ct., 15 D. R., 669 (1906); U. S. Circ. Ct. Ap., 16 D. R., 212 (1906).

(40) International Coal Mining Co. *v.* Penna. R. R. Co., U. S. Circ. Ct., 16 D. R., 529 (1907); *Contra.* Same Title Phila. C. P., 15 D. R., 225 (1906).

(41) See Sec. 676.

(42) Reynolds *v.* Reynolds Lumber Co., 169 Pa., 626 (1895).

including the plaintiff in the writ. . . . . The proceeds of sales under the special fi. fa., as we have seen, are, however, to be distributed as in proceedings in insolvency."[43] In Reynolds *v.* Reynolds Lumber Co., 169 Pa., 626 (1895); 175 Pa., 437 (1896), however, it was held that the execution creditor is entitled to the fund raised by the sale, to the exclusion of general creditors.

"In giving to the execution a grasp on all the property of the corporation within the Commonwealth, and authorizing the levy and sale thereof, with the same effect as if it was located, used, levied upon and sold in the county wherein said writ of execution was issued, it is manifest that the Legislature must have intended the sale to be for the common benefit of all the creditors, otherwise gross injustice would be done to such of them as resided out of the county in which the execution was issued, but within a county where a portion of the property was situated, and who had trusted the corporation on the faith of it."[44]

636. Attachment Executions Against Corporations.[45]

So much of the Act of Assembly passed June 16, 1836, entitled "An act relating to executions," as provides for the levy and recovery of stock, deposits and debts due to defendants, by process of attachments and scire facias, is hereby extended to all cases of attachment to be issued upon judgments against corporations (other than municipal corporations), and from and after the passage of this act all such process, which hereafter may be issued, may be proceeded in to final judgment and execution, in the same manner, and under the same rules and regulations as are directed against corporations, by the provisions of the Act of June 16, 1836, relating to executions; and so much of the thirty-sixth section of the Act of June 16, 1836, as requires service of the attachment on any defendant be, and the same is, hereby repealed, except where the defendant is a resident of the county in which the attachment issued.[46]

The Act of June 16, 1836, P. L., 755, gave execution against

(43) East Side Bank *v.* Columbus Tanning Company, 170 Pa., 1 (1895); Second Nat. Bank of Titusville *v.* Gibbs & Sterrett Mfg. Co,. 13 W. N. C., 174 (1883).

(44) Bayard's Appeal, 72 Pa., 453 (1872).

(45) See Secs. 637, 735.

(46) Sec. 4, Act March 20, 1845, P. L., 188.

a solvent corporation in all cases where it might be had against an individual, except execution on the corporation's choses in action. Execution as to them was not granted until the passage of the Act of March 20, 1845.[47]

Prior to the passage of the foregoing Act of March 20, 1845, attachment executions did not lie against corporations.[48]

An attachment execution against a railroad company cannot be levied on money in the hands of its ticket agents arising from the sale by them of tickets to passengers.[49]

A subscription to the stock of a corporation is subject to attachment execution at the suit of a judgment creditor of the corporation. In such case, if there be a lien on the stock, or a liability of the stock to others, it must be specifically set up as a defense.[50]

A creditor of a mutual fire insurance company reduced his claim to judgment and issued an attachment execution thereon, wherein a member of the company was summoned as garnishee. Said garnishee was indebted to the company on his premium note for his proportion of the losses sustained. The amount of said indebtedness was not, however, fixed by assessment. Subsequently the company was dissolved by decree of court, and a receiver was appointed who proceeded to levy an assessment on all the premium notes to meet outstanding liabilities at the time of the dissolution. Held, that the attaching creditor, by virtue of his attachment, was entitled to the amount thus assessed by the receiver on the garnishee.[51]

The property of a corporation defendant is not attachable in the hands of its officers while held by them as officers merely, and a writ of attachment execution issued against and served upon a corporation defendant and its "secretary and treasurer," as sole garnishee, will be quashed.[52]

The shares of stock of a bank, owned by itself and in its own

(47) Ridge Tpk. Co. *v.* Peddle, 4 Pa., 490 (1846).

(48) Farmers' & Mechanics' Nat. Bank *v.* Ryan, 64 Pa., 236 (1870); Ridge Tpk. Co. *v.* Peddle, 4 Pa., 490 (1846); Nav. Co. *v.* Ledlie, 1 Clark, 498 (1843).

(49) Fowler et al. *v.* Pitts., Ft. W. & C. R. Co., 35 Pa., 22 (1859).

(50) Peterson *v.* Sinclair, 4 W. N. C., 97 (1877).

(51) Hays *v.* Lycoming Fire Ins. Co., 99 Pa., 621 (1882).

(52) First Nat. Bank *v.* Bristol Iron & Steel Co., 12 Pa. C. C., 176 (1892).

possession, are not the subject of attachment execution for the payment of its debts, under the Act of June 16, 1836.[53]

Bank deposits of corporations are subject to attachment executions.[54]

Insolvent corporations are subject to attachment execution equally with solvent ones.[55]

The Act of March 20, 1845, P. L., 1888, allowing attachment executions against debts due corporations was not repealed as to solvent corporations by the Act of April 7, 1870, P. L., 58.[56]

637. Corporations as Garnishees in Attachment Execution.[57]

A foreign corporation located in Pennsylvania may be made garnishee in execution attachment, under the Act of June 16, 1836.[58]

Such a foreign corporation may not have an insufficient service of writ set aside, where it has entered a general appearance.[59]

Where stock of a bank, assigned as collateral, has been attached in the hands of an assignee, the bank not being served, a subsequent attachment acquires no priority by service on the bank, as well as on the assignee, service on the bank being unnecessary.[60]

When attachment execution was issued against stock of a defendant in a corporation, garnishee, held by it under an assignment as a collateral security for a loan, held, that the fi. fa. should issue against the original defendant, and not against the corporation.[61]

The assignment of the stock of a corporation to itself as collateral security for a loan, divests the title of the assignee so far as to prevent a sale of it under a fi. fa. against him. In such case execution must be by attachment, under the Act of 1836.[62]

(53) Hawley *v.* Lumberman's Bank, 10 Watts, 230 (1840).

(54) Penrose *v.* Erie Canal Co., 3 Phila., 198 (1858); Bank *v.* Ryan, 2 Lanc. Bar, No. 10, 2.

(55) Reed *v.* Penrose's Executors, 2 Grant, 472 (1859).

(56) Blake *v.* Pitts., Johnstown etc. R. Co., 26 Pa. C. C., 63 (1902).

(57) See Sects. 636, 735.

(58) Jones *v.* N. Y., L. E. & W. R. Co., 1 Grant, 457 (1857).

(59) Com. Title Ins. & T. Co. *v.* Brown, 1 D. R., 583 (1891).

(60) Geddes *v.* Geddes, 7 Pa. C. C., 660 (1890).

(61) Stoever *v.* Stoever, 3 W. N. C., 169 (1876).

(62) Eby *v.* Guest, 94 Pa., 160 (1880); Early & Lane's Appeal, 89 Pa., 411 (1879).

A writ of attachment execution in which a domestic corporation having its office outside the county is garnishee, may be served on the general manager, who is also a member of the board of directors of the garnishee, when he is temporarily within the county.[63]

An attachment execution is of a two-fold nature; as to the defendant in the judgment it is a species of execution, but as to the garnishee it is an original process, and as such may be served, under the Act of May 13, 1889, P. L., 198, upon a foreign insurance company, garnishee, by the sheriff of a county other than that in which the writ issued,[64] and service upon the "State agent," anywhere within the Commonwealth is a good service upon the company.[65]

A defendant's shares of stock cannot be reached by a levy of attachment in an action begun outside the State wherein the corporation is incorporated. For purposes of attachment the stock is located where the corporation is incorporated, and nowhere else.[66]

Where it is satisfactorily shown that money deposited in the name of one person is really the property of another, it cannot be attached as a debt due the depositor,[67] but in a case where the defendants might, at any moment, have drawn out the balance on their own cheque, without any one being able to interpose to prevent it, held, that this account was liable to attachment notwithstanding the plea that the fund had been appropriated to a specific purpose, viz.: payment of coupons on construction bonds.[68]

An attachment execution against a corporation in the hands of a receiver is properly served upon the receiver, and such service entitles the plaintiff in the attachment to the dividend in the receiver's hands when declared.[69]

(63) Reynolds *v.* Lochiel Iron & Steel Works, 11 Pa. C. C., 33 (1892).

(64) McDonald *v.* Stear, 7 D. R., 190 (1898).

(65) Kennedy *v.* Agricultural Ins. Co., 165 Pa., 179 (1895); 35 W. N. C., 457.

(66) Weaver *v.* Manville, 21 Pa. C. C., 318 (1898). Citing Cook on Stock and Stockholders, Sec. 485.

(67) Bank of Northern Liberties *v.* Jones, 42 Pa., 536 (1862); Jones *v.* Bank of Northern Liberties, 44 Pa., 253 (1863).

(68) Farmers' & Mechanics' Nat. Bank *v.* Ryan, 64 Pa., 236 (1870).

(69) Merchants' Nat. Bank *v.* Binder, et al., 6 D. R., 633 (1897).

638. Executions to Enforce Decrees in Equity.

Executions may issue under the Act of June 16, 1836, to enforce decrees in equity, as well as to satisfy common law judgments.[70]

639. Foreign Attachments Against Corporations.

Foreign attachment lies against a corporation incorporated under the laws of another State.[71]

In foreign attachments against a corporation as defendant, the dissolution of the corporation by a decree of forfeiture of its charter, before judgment against it, dissolves the attachment. The garnishee may take advantage of this by pleading it, notwithstanding judgment had been entered against the defendant for default of appearance.[72]

Where the garnishee in a foreign attachment is a domestic corporation with its principal office outside the county where the writ issues, a sheriff's return of service upon a local agent of the corporation within the county, the company having no office or place of business there, will be set aside.[73]

A citizen of another State has a right to sue out a writ of foreign attachment in Pennsylvania against a foreign corporation.[74]

Proceedings in foreign attachment against a foreign corporation will not be quashed merely because the foreign corporation is in the hands of a receiver in the State wherein it was incorporated.[75]

Foreign attachment will lie against a foreign corporation, even though it has an agent in the State, or even in the very county where suit is begun. It is no ground to quash a foreign attachment against a foreign corporation that the plaintiff served a copy of the statement and a rule to arbitrate on the agent of the defendant.[76]

(70) Wesley Church *v.* Moore, 10 Pa., 273 (1849).

(71) Bushel *v.* Com. Ins. Co., 15 S. & R., 173 (1827); Pains' Pyro-Spectacle Co. *v.* Lincoln Park & S. S. Co., 19 Pa. C. C., 21, 23 (1896).

(72) Farmers' & Mechanics' Bank *v.* Little, 8 W. & S., 207 (1844).

(73) Smith, Kline & French Co. *v.* Morse Wool Scouring Co., 10 Pa. C. C., 624 (1891); National Starch Co. *v.* Id., 11 Pa. C. C., 192 (1892).

(74) John Ray Clark Co. *v.* Toby Valley Supply Co., 14 Pa. C. C., 344 (1894).

(75) Voght *v.* Covenant B. & L. Assn., 21 Pa. C. C., 351 (1898).

(76) Diener *v.* Wopsononock Hotel Co., 23 Pa. C. C., 376 (1899).

Under the laws of New Jersey, a corporation of that State provided in its charter that the common stock should be assessable only in the event of insolvency of the company, upon legal demand of outside creditors. The balance due on a subscription to the stock of such corporation from the subscriber is not subject to foreign attachment.[77]

Though an agent of a foreign corporation doing business in Pennsylvania, without complying with the Act of April 22, 1874, P. L., 108, may be personally liable for debts incurred by him on behalf of the corporation, such transactions do not make him liable as garnishee of the corporation, in an attachment against it.[78]

The stock of a non-resident, in a foreign corporation, is not the subject of a foreign attachment, though the corporation does business and is found within the State.[79]

640. Discovery of the Effects of a Corporation.

Whenever a judgment may be rendered in any court of record against any private corporation within this Commonwealth, in any civil action, and a writ of fieri facias shall be issued on such judgment, and the sheriff to whom the same may be directed, shall make a return of *nulla bona* on the same, it shall and may be lawful for the plaintiff in such action to apply by petition and affidavit to the court in which such judgment has been rendered, stating that no property of the defendants can be found on which an execution may be levied, and that the party making the application verily believes that the effects of the corporation are concealed for the purpose of avoiding the payment of their debts, whereupon the said court may issue a citation, directed to the president, secretary, treasurer, or other officers and members of the said corporation, commanding him or them to appear in court on a certain day, and answer such interrogatories as may be put to them touching the effects of the corporation, which citation shall be served by the sheriff, and it shall be the duty of the plaintiff to file interrogatories to be put to such officer or member, at least fifteen days before the return day of such citation, in the office of the prothonotary of such court, and the person or persons to whom the said citation shall be directed shall, on or before the

(77) Jagode *v.* Smalley, 10 Pa. Super. Ct., 320 (1899).
(78) Zucker *v.* Froment, 5 D. R., 579 (1896).
(79) Greenwood *v.* Hat Sweat Mfg. Co., 13 W. N. C., 447 (1883).

return day thereof, file his or their answers to such interrogatories, upon oath or affirmation, in the office of the prothonotary, and if any person to whom such citation may be directed shall neglect or refuse to file his answers as aforesaid, or shall file answers which in the opinion of the court shall be unsatisfactory, it shall be lawful for the court to issue an attachment for contempt against the person so refusing to answer, or answering unsatisfactorily, and if upon the answers to such interrogatories it shall appear that any effects of the said corporations are in the possession or power of any member of the corporation, or of any other person or persons it shall and may be lawful for the court to issue an order in the nature of an order of sequestration, which, being served by the sheriff on the person or persons in whose possession or power such effects are alleged to be, shall have the same force and effect as if he or they had been summoned as garnishees in a foreign attachment, and the like proceedings shall thereafter be had against him or them as may be had against such garnishees after judgment rendered against the defendant in a foreign attachment, and any debtor of the said corporation may plead such sequestration and proceedings against him in bar of any action brought by such corporation, exactly as the garnishee in a foreign attachment may plead the proceedings in the same, in bar of an action by the defendant in the same.[80]

641. Stay of Execution.

Corporations are within the provisions of the Act of 1836 relating to stay of execution.[81]

(80) Act April 14, 1828, P. L., 439.

(81) Allinson *v.* Phila. & R. R. R. Co., 45 Leg. Int. 226; 5 Pa. C. C., 344 (1888); Boyer *v.* R. R. R. Co., 1 Pearson, 113, not followed.

CHAPTER XXVII.

REORGANIZATION OF CORPORATIONS.

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642. Purchasers of the Property and Franchises of Corporations May Become Bodies Corporate.

Whenever the material, rolling stock, property and franchises of any gas, water, coal, iron, steel, lumber, oil or mining or manufacturing, transportation or telegraph company, or any railroad, canal, turnpike, bridge or plank road, or of any corporation, created by or under any law of this State, shall be sold and conveyed, under and by virtue of any process or decree of any court of this State or of the Circuit Court of the United States, or under or by virtue of a power of sale contained in any mortgage or deed of trust, without any process or decree of a court in the premises, the person or persons for, or on whose account such material, rolling stock, property and franchises of any gas, water, coal, iron, steel, lumber, oil, mining or manufacturing, transpor-

tation or telegraph company, or any railroad, canal, turnpike, bridge or plank road, or of any corporation, created by or under any law of this State, may be purchased, shall be and they are hereby constituted a body politic and corporate, and shall be vested with all the right, title, interest, property, possession, claim and demand in law and equity, of, in and to such material, rolling stock, property or franchises of any gas, water, coal, iron, steel, lumber, oil or mining or manufacturing, transportation or telegraph company, or any railroad, canal, turnpike, bridge or plank road, or of any corporation, created by or under any law of this State, with the appurtenances, and with all the rights, powers, immunities, privileges and franchises of the corporation, as whose the same may have been so sold and which may have been granted to or conferred thereupon, by any act or acts of assembly whatsoever, in force at the time of such sale and conveyance, and subject to all the restrictions imposed upon such corporation by any such act or acts, except so far as the same are modified hereby.[1]

643. Organization of Corporation by the Purchasers.

. . . . And the person(s) for or on whose account any such material, rolling stock, property and franchises of any gas, water, iron, steel, lumber, oil, or mining or manufacturing, transportation or telegraph company, or any railroad, canal, turnpike, bridge or plank road, or of any corporation, created by or under any law of this State, may have been purchased, shall meet, within thirty days after the conveyance thereof shall be delivered, public notice of the time and place of such meeting having been given, at least once a week for two weeks, in at least one newspaper published in the city or county in which such sale may have been held, and organize said new corporation by electing a president and board of six directors (to continue in office until the first Monday of May succeeding such meeting, when and annually thereafter on the said day a like election for a president and six directors shall be held to serve for one year) and shall adopt a corporate name and common seal, determine the amount of the capital stock thereof, not exceeding the amount authorized in the original charter, and shall have power and authority to make and

(1) Sec. 1, Act of May 31, 1887, P. L., 278, amending Sec. 1, Act May 25, 1878, P. L., 145, which was supplementary to the Act of April 8, 1861, P. L., 259.

issue certificates therefor to the purchaser or purchasers aforesaid, to the amount of their respective interests therein, in shares of fifty dollars each, and may then, or at any time thereafter create and issue preferred stock to such an amount and on said terms as they may deem necessary, and from time to time issue bonds, at a rate of interest not exceeding six per centum, to any amount not exceeding their capital stock, and to secure the same by one or more mortgages upon the real and personal property and corporate rights and franchises, or either, or any part or parts thereof: *Provided,* That no coal, iron, steel, lumber, or oil, or mining, manufacturing, transportation or telegraph company, shall have the benefit of this act, unless it shall have previously filed, with the Secretary of State, its acceptance of all the provisions of the Constitution, as provided by law.[2]

644. Reorganized Corporation to Register in Office of the Secretary of the Commonwealth.

It shall be the duty of such new corporation, within one calendar month after its organization, to make a certificate thereof, under its common seal, attested by the signature of its president, specifying the date of such organization, the name so adopted, the amount of capital stock, and the names of its president and directors, and transmit the said certificate to the Secretary of State, at Harrisburg, to be filed in his office and there remain of record; and a certified copy of such certificate, so filed, shall be evidence of the corporate existence of said new corporation.[3]

645. Reorganized Corporation Must Accept Provisions of the Constitution.

The provisions of this act shall not inure to the benefit of any corporation unless such corporation shall, before claiming or using the benefits of this act, file in the office of the Secretary of the Commonwealth, an acceptance of the provisions of article sixteen of the Constitution of this Commonwealth, which accept-

(2) Sec. 1, Act May 31, 1887, P. L., 280, amending Sec. 1, Act May 25, 1878, P. L., 145, which was supplementary to the Act of April 8, 1861, P. L., 259.

(3) Sec. 2, Act May 25, 1878, P. L., 145.

ance shall be made by resolution adopted at a regular or called meeting of the directors, trustees or other proper officers of such corporation, certified under the seal of the corporation; and a copy of which resolution, certified under the seal of the office of the Secretary of the Commonwealth, shall be evidence for all purposes.[4]

646. Purchasers of the Property and Franchises of Corporation May Determine the Amount of Capital Stock and Bonds to be Issued Therefor.

In all cases in which the property and franchises of any corporation mentioned in the act and its supplement to which this is a further supplement, or of any telegraph company, may have been or shall hereafter be purchased at any sale, by virtue of any process or decree of any court of this Commonwealth or the Circuit Court of the United States, or under or by virtue of a power of sale contained in any mortgage or deed of trust, without any process or decree of a court in the premises, the person or persons for or on whose account the same may have been or shall hereafter be purchased, shall have power and authority to determine the amount of the capital stock and bonds to be issued therefor, and to issue therefor certificates for the said capital stock, and also bonds, and to secure the same by mortgage or mortgages on the real and personal property, corporate rights and franchises purchased. Such stock or bonds, or both, shall be issued to the purchaser or purchasers for their respective interests, in such amounts and proportions as may be determined by themselves, and shall be deemed and taken to have been issued for and in consideration of the property and franchises so purchased and received: *Provided,* That no railroad, canal or other transportation company, or telegraph company, shall have the benefit of this act, unless it shall have previously filed, with the Secretary of State, its acceptance of all the provisions of the Constitution of this State, in manner and form as provided by law.[5]

(4) Sec. 3, Act May 25, 1878, P. L., 145.

(5) Sec. 1, Act May 31, 1887, P. L.. 276; supplementary to the Act of May 25, 1878, P. L., 148, which was a supplement to the Act of April 8, 1861, P. L., 259. The Act of May 25, 1878, professes to be a supplement *to a supplement* of the Act of 1861, but what that first supplement is, the writer has been unable to ascertain.

647. Ratification of Issues of Stock and Bonds Made by Purchasers of Corporate Property Organizing Corporations Prior to the Passage of this Act.

In all cases in which the property and franchises of any corporation mentioned in the act and its supplements, and to which this is a further supplement, or of any telegraph company, have been sold, by virtue of any [process] or decree of any court of this Commonwealth or the Circuit Court of the United States, and the person or persons for or on whose account the same have been purchased, have organized a corporation under the provisions of said act, and have issued stock and bonds to the purchaser or purchasers for their respective interests, secured by mortgage, in such amount and proportions as may have been determined and agreed upon by them, such issues are hereby ratified, approved and confirmed.[6]

648. Corporations May Not Have the Benefit of the Act Unless They Accept the Constitution.

The provisions of this act shall not inure to the benefit of any corporation, nor shall they be considered as validating or confirming any act heretofore done by any corporation, unless such corporation shall, before claiming or using the benefits of this act, file in the office of the Secretary of the Commonwealth, an acceptance of the provisions of article sixteen of the Constitution of this Commonwealth, which acceptance shall be made by resolution adopted at a regular or called meeting of the directors or trustees or other proper officers of such corporation, certified under the seal of the corporation; and a copy of which resolution, certified under the seal of the office of the Secretary of the Commonwealth, shall be evidence for all purposes.[7]

649. What Companies are Within the Meaning of the Act of 1887.

Artificial gas companies are sufficiently covered by the title of said act, being included in the designation of manufacturing companies, to permit of reorganization after judicial sale, under its provisions.[8]

(6) Sec. 2, Act May 25, 1878, P. L., 148.

(7) Sec. 3, Act May 25, 1878, P. L., 148.

(8) Gas & Water Co. of Downingtown *v.* Borough of Downingtown, 193 Pa., 255 (1899).

Electric light, heat and power companies are manufacturing companies within the meaning of said act.[9]

650. Review of the Acts of 1861, 1878, and 1887.

By these acts all acts subsequent to organization are to be done by the company and not by agents for organization. The statutory direction "to determine the amount of capital stock," does not mean to ascertain the actual cash value paid in by the purchasers, but to determine into how many shares of the nominal value of fifty dollars each the property and franchises shall be divided. Directions in regard to organization are not conditions of the being of the company; not following them will, at most, work a forfeiture and enable the Commonwealth to retake the franchises; it cannot entitle her to judgment that the franchises do not exist.[10]

"The Act of April 8, 1861, P. L., 259, provides that whenever a railroad, canal, turnpike, bridge or plank road of any corporation shall be sold by any process or decree of court in this State, or of the Circuit Court of the United States, the purchaser shall be vested with the franchises of the corporation. The supplement thereto of April 18, 1864, P. L., 452, declares that when the sale is by an assignee or trustee, such sale shall confer the privileges given by said Act of 1861. The Act of February 19, 1867, P. L., 28, extends the provisions of the said Act of 1861 to a sale made by virtue of a power of sale in a mortgage or deed of trust, without any process or decree of court. The Act of May 25, 1878, P. L., 145, provides that whenever the material, rolling stock, property and franchises of any gas, water, coal . . . . or any corporation created by or under the laws of this State shall be sold and conveyed by virtue of any process or decree of court of this State or of the Circuit Court of the United States, the person or persons on whose account such material . . . . may be purchased shall be considered a body politic." [10*]

The Acts of 1861, 1864 and 1867 relate only to the sale of the

(9) Com. *v.* Keystone Elec. Lt., Ht. & Pr. Co., 193 Pa., 245 (1899).

They are not, however, manufacturing companies within the meaning of tax acts. Com. *v.* Edison Elec. Co., 145 Pa., 131; Com. *v.* Edison Elec. Lt. & Pr. Co., 170 Pa., 231; Com. *v.* Northern Elec. Lt. & Pr. Co., 145 Pa., 105.

(10) Com. *v.* Central Pass. Ry. Co., 52 Pa., 506 (1866).

(10*) Lehigh Iron Co.'s Assigned Estate, 12 Pa. C. C., 257 (1892).

property of public corporations. The Act of 1878 applies to all corporations, but only when both property *and* franchises have been sold. Held, further, that a general assignment by a manufacturing company did not cover the franchises of the company. "It ought to be provided that a general assignment for the benefit of creditors by a corporation shall pass the franchises. . . . Then a court decreeing the sale of real estate constituting the works of the concern could order it and the franchises to be sold together." [11]

651. Decisions Relative to Reorganizations.

Parties who were owners of the bonds of a railroad company about to be sold under foreclosure of a mortgage securing the same, entered into an agreement that, in case of the purchase of the railroad in their interest as bondholders, they would not claim their proportion of the proceeds of the sale, but would take in lieu thereof bonds to be issued on a reorganization of the company. There was no stipulation in the agreement as to which of the bondholders should purchase the property, nor as to contribution toward the expenses of the sale and reorganization. A, one of the bondholders, undertook to buy at the sale, but the property was sold to B, another party, who subsequently transferred the title to A. A began to reorganize the railroad and requested the other parties to the agreement to join in the payment of expenses, which they refused to do, and afterwards filed a bill in equity against A for an accounting of the proceeds in his hands. Held, that, conceding the purchase of the railroad, its reorganization by A was done in fulfillment of the agreement, and this was to inure to the benefit of the other contracting parties, yet the latter were debarred by their refusal to share in the expenses, from claiming any interest in the purchase.[12]

Where the reorganization committee of a corporation has a discretionary power to extend the time to a stockholder to sign the reorganization agreement, and has also the power to delegate this power to its chairman, and the chairman orally extends the time to a stockholder, the latter has the right, even after the expiration of

(11) Lehigh Iron Company's Assigned Estate, 12 Pa. C. C., 257 (1892).

(12) Appeals of the Fidelity Ins. Co. and of Charles Lennig, 106 Pa., 144 (1884).

the time limited in the agreement, to join in the reorganization plan and participate in its benefits.[13]

The creditors of an insolvent corporation appointed a committee to reorganize the corporation, with authority to acquire the corporate property and do such other things as might be necessary. The committee bought the property and proposed a scheme of reorganization which was rejected by the creditors, who instructed the committee to sell the property. A bill in equity was filed by one of the creditors, who had voted against the proposed scheme of organization, seeking to enjoin the sale and compel the reorganization of the company. Held, that such creditor had no status to object to the action taken.[14]

An agreement, on the reorganization of a corporation, that the new company shall pay "the expenses of carrying out this agreement, printing new bonds, etc.," covers all reasonable and necessary expenses in carrying out the same, including the fees of an attorney for professional services rendered in connection with such reorganization.[15]

The property of the D Railroad Company was purchased by E and F, who, under an act then in force, proposed to reorganize the corporation within the time prescribed in the act. A new company was formed, named G. Before the reorganization was completed, and while the road was operated by the lessee of D, X was injured on the road and brought suit against G to recover for the injuries received. Judgment for plaintiff was reversed.[16]

The mortgaged property of a railroad company was sold under foreclosure proceedings. The purchasers organized a new company and took possession of all the assets of the old company.

At a sheriff's sale, on an execution against an incorporated company, A bought in the company's property with money given him for the purpose by the company. He subsequently transferred said property in good faith, with the approval of the board of directors, and the assent and acquiescence of the stockholders of the company, to a newly organized corporation into which the old one was merged. After this transfer, an attachment execution was

(13) Raleigh *v.* Earle et al., 185 Pa., 78 (1898), affirming 18 Pa. C. C., 99 (1896).

(14) Froment *v.* Lessig, 174 Pa., 487 (1896).

(15) Catawissa R. Co. *v.* Titus, 49 Pa., 277 (1865).

(16) Pitts., Cin. & S. L. R. Co. *v.* Fierst, 96 Pa., 144 (1880).

issued against A as garnishee of the original company. Held, that he was not liable as garnishee of said company, either for the property purchased for and transferred to them, or the value thereof.[17]

A bill in equity was filed to foreclose a mortgage given by the N. C. Co. and a decree was entered thereon authorizing such bondholders as should become purchasers to pay their bids in bonds. The railroad was purchased by H for certain bondholders, and a master was appointed to report distribution and the form of conveyances. The said master reported that H purchased on behalf of certain bondholders and such others as might wish to join in purchasing and pay their proportion of the purchase money and expenses, and that the property was bought to sell again as three-fourths of the bondholders should direct. H subsequently conveyed under such direction to the W. P. R. Company, organized by the purchasing bondholders to succeed the N. R. Company "free and discharged from all and every trust whatever." The act incorporating the W. P. R. Company, recited that said company was formed by the persons named and "all others who hold mortgage bonds," but the preamble set out the deed to H "in trust for all bondholders who participated in said purchase," and that it was desirable "to reimburse the said bondholders for their expenditures of money and labor." Held, that H's duty, notwithstanding general expression in the deeds and act of assembly, was to distribute the stock only to such bondholders as participated in the purchase or subsequently exercised their option to come in, and the last chance to exercise such option was when the deed was made to the W. P. R. Company, clear of all trusts.[18]

When the reorganization committee of stockholders of an insolvent corporation offer a plan of reorganization to the stockholders with a time limit within which assessments on the stock to carry out the plan are to be paid, a stockholder who has not paid his assessment within the time specified has no standing thereafter to compel the committee to receive the assessment merely because it has accepted assessments from other stockholders after the expiration of the time limited.[18*]

Purchasers of the property of a corporation agreed to pay a

(17) Balliet *v.* Brown, 103 Pa., 546 (1883).
(18) Landis *v.* West Penna. R. Co., 133 Pa., 579 (1890).
(18*) Keane *v.* Moffly, 217 Pa., 240 (1907).

certain amount for the personal property and to account for the book debts which they should collect. There was no agreement to guarantee the collection of these debts. On a bill for account it was sought to surcharge the new company with a deficiency in the book accounts which were uncollectible. Report of master refusing this was affirmed. Held, not to be error.[19]

Where several persons purchase the charter and stock of a corporation and guarantee the vendors against any claims for commissions which might be made by an agent in whose hands the charter had been placed for sale, the purchasers are personally liable, and nothing short of a clear and unequivocal ratification can render the company liable on the guarantee. In such case a resolution authorizing the treasurer of the company to repay to the purchasers the money advanced by them will not amount to a ratification when it does not appear from the minutes of the corporation that the company knew of the existence of the guarantee when the resolution was passed.[20]

Where a stockholder had drawn on account of "interest" and in lieu of dividends, a greater amount than he was entitled to draw, during his lifetime, and after his decease and the reorganization of the company, under a resolution of the corporation authorizing the directors not to issue new stock to stockholders until the debts due by them to the company should be paid, or, on their failure to pay the same within sixty days, to apply a sufficient amount of the stock at par to the payment of the debt and issue the balance to the stockholder, stock was issued to said deceased stockholder's estate for an amount equal to his former holdings, less the amount of said indebtedness, such action was sustained, it being held that the resolution was reasonable and within the corporate powers.[21]

An Act of Assembly provided that if the A railroad should be sold under the foreclosures of mortgages the purchaser should become a corporation. The property of said company was so sold and the purchasers, being the bondholders under the mortgage, reorganized the company as the A Railway Company. Held, that they were not liable for the obligations of the railroad company; that the railway company derived its existence under the Act of

(19) Huston *v.* Clark, 162 Pa., 435 (1894).
(20) Denniston *v.* Home Life & Investment Co., 162 Pa., 86 (1894).
(21) Reading Trust Co. *v.* Reading Iron Works, 137 Pa., 282 (1890).

Assembly passed before the sale, and its coming into existence was on the contingency of the sale, and that there was, therefore, no privity between the parties. The stockholders in the original company by an arrangement subsequent to the purchase and before the reorganization of the new company were allowed to become stockholders of the new company without the payment of any money. Held, that this did not impose upon the new company the debts of the old. The creditors of B attached his securities held by the old company, and judgment was had against the company as garnishee. The officers of the company having charge of the securities not being parties to the attachment were not liable to the plaintiffs. Their possession and acts were those of the company and their liability, if any, was to the company, not to the plaintiffs.[22]

J bought at receiver's sale all the franchises and property of the N. C. N. Ry. Co., and a deed therefor was made to him. He with others then organized the N. C. & S. V. R. Co., which, under the Act of May 25, 1878, P. L., 145, became possessed of all the rights, privileges and franchises of the N. C. N. Ry. Company. Alleging collusion and fraud by J, at receiver's sale, the N. C. N. Ry. brought ejectment against the N. C. & S. V. R. Co. for the portion of the roadbed lying within L county. Held, that irrespective of the plaintiff's standing in equity, it had no legal existence and hence no standing in a court of law, and that, even if it had, it would not be permitted to dismember a public highway by successive actions of ejectment for parts of its roadbed. If any remedy lay for the fraud alleged, it was by bill in equity, or, possibly, by quo warranto.[23]

652. Purchasers of Property and Franchises Take Them Cum Onere.

When the charter of a water company, incorporated prior to 1874, provided that if, in the construction of its works "an injury should be done to private property," compensation should be made, and injury was done to such property, and the franchises and property of the company were sold before compensation for such injury was made, held, that the purchaser at judicial sale,

(22) Stewart, Mulconnery & Co.'s Appeal, 72 Pa., 291 (1872).

(23) New Castle Northern Ry. Co. *v.* N. C. & Shenango V. Ry. Co., 30 W. N. C., 507 (1892).

another water company, took subject to the claim of the defendant for such injury.[24]

653. The Secretary of the Commonwealth Has no Option as to Filing Certificates of Reorganization.

The Secretary of the Commonwealth has no option in the matter of filing certificates of reorganization given to him for filing. The duty of filing is wholly ministerial.[25]

654. When the Reorganized Company is Formed.

The new company is formed as soon as the certificate of reorganization is filed.[26]

655. Name of the Reorganized Company.

The reorganized company may bear the name of the old corporation or a new name.[27]

(24) Lycoming Gas & Water Co. *v.* Moyer, 11 W. N. C., 443 (1882); 99 Pa., 615.

(25) Princes' Metallic Paint Co. Op. Atty. Gen., 5 Pa. C. C., 194 (1888); Fayette Fuel Gas Co., Op. Sec. Com., 11 Pa. C. C., 488 (1892); 1 D. R., 444; 30 W. N. C., 256.

(26) Princes' Metallic Paint Co., Ap. Atty. Gen., 5 Pa. C. C., 194 (1888); Com. *v.* Central Pass. Ry. Co., 52 Pa., 1; Pgh., Cin. & St. L. R. R. Co. *v.* Fierst, 96 Pa., 144.

(27) Prince's Metallic Paint Co., Op. Atty. Gen., 5 Pa. C. C., 194 (1888).

CHAPTER XXVIII.

CONSOLIDATION AND MERGER.

656. Merger and Consolidation of Corporations of the First Class.
657. Sale of Franchises and Property of Corporations of the Second Class.
658. Merger of Corporations in Existence on April 29, 1874.
659. Merger and Consolidation of Natural Gas Companies.
660. Merger and Consolidation of Meadow Companies.
661. Merger and Consolidation of Railroad Companies, Including Street Railway Companies.
662. Merged Railroad and Street Railway Companies May Issue Bonds.
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669. Subscriptions to Stock of the Consolidated Companies.
670. Passenger Railway Companies are "Railroads" within the Meaning of the Act of May 16, 1861.
671. Liability of the Corporation Formed by the Consolidation.

656. Merger and Consolidation of Corporations of the First Class.

. . . . And if any two or more such corporations shall desire to consolidate and merge with each other, or one or more within the other, upon application to the Court of Common Pleas of the county in which the corporation is situated, into which the one or more desire to merge or become consolidated with the same, proceedings shall take place as are required on an application to amend; and upon decree being made by said court, and the same being recorded in said county, upon the terms specified in said application, the said corporation, with all their rights, privileges, franchises, powers and liabilities, shall merge and be consolidated into, by the name, style and title given to the same in such decree, and upon the terms, limitations and with the powers stated and conferred in said application and decree.[1]

(1) Sec. 12, Act April 17, 1876, P. L., 37, amending Sec. 42, Act April 29, 1874.

657. Sale of Franchises and Property of Corporations of the Second Class.

Any corporation created under the provisions of this act, and any corporation of the classes named in the second section hereof, that is now in existence by virtue of any law of this Commonwealth, may reduce its capital stock or alter and change the par value of the shares thereof, by a vote of the stockholders taken in the manner and under the regulations prescribed in the eighteenth, nineteenth, twentieth, twenty-first and twenty-second sections of this act; and it shall be lawful for any corporation in the same manner to sell, assign, dispose of and convey to any corporation created under or accepting the provisions of this act, its franchises and all its property, real, personal and mixed, and thereafter such corporation shall cease to exist, and the said property and franchises not inconsistent with this act, shall thereafter be vested in the corporation so purchasing as aforesaid.[2]

The last clause of the foregoing section applies to corporations formed after its passage as well as to those formed and existing prior thereto.[3]

A majority of the stockholders may, by proper corporate action, sell and dispose of the property of a corporation, but a dissenting stockholder cannot be compelled to take anything but cash for his stock on the sale of the corporate property, but if such stockholder be present at a meeting of the stockholders whereat the sale of the property of the corporation in certain terms is authorized by a majority in interest of the stockholders, and does not then dissent from such sale, he may not repudiate the terms on which the sale was authorized and made, and decline to accept payment for his stock in accordance with the conditions of sale.[4]

658. Merger of Corporations in Existence on April 29, 1874.

. . . Any corporation or corporations for any of the purposes named and covered by the provisions of this act, heretofore created by any special act or acts, or in existence under the provisions of any general law of this Commonwealth, shall be enti-

(2) Sec. 5, Act April 17, 1876, P. L., 33, amending Sec. 23 of the Act of April 29, 1874.

(3) Hey *v.* Springfield Water Co., 207 Pa., 38 (1903).

(4) Carr *v.* Rochester Tumbler Co., 207 Pa., 392 (1903). See Toland *v.* Bethlehem Iron Co., 27 Pa. C. C., 666 (1902).

tled to all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same, upon filing in the office of the Secretary of the Commonwealth a certificate of a single corporation, or a joint certificate if two or more corporations incorporated for and doing the same kind of business, under the seal or seals of said corporation or corporations, accepting the provisions of the Constitution and of this act, duly authorized by a meeting of stockholders called for that purpose; and upon such acceptance and approval by the Governor, he shall issue letters patent to said corporation, or if two or more corporations, to said corporation as one corporation, under such name as shall be designated by said corporation or corporations in said single or joint certificate, together with the amount and capital, number of shares and par value thereof, as shall be designated by said corporation or corporations in said certificate: *Provided,* That where two or more corporations shall make a joint certificate as aforesaid, and letters patent shall be issued to said new corporation, said corporations shall thenceforth be deemed, held and taken to be merged and consolidated and be subject to all the limitations and liabilities of this act.[5]

659. Merger and Consolidation of Natural Gas Companies.[6]

660. Merger and Consolidation of Meadow Companies.

Where the districts of two or more meadow companies are contiguous to each other, it shall be lawful for them to consolidate their franchises and corporate rights and to become one company, by an agreement duly executed and recorded in the office for recording of deeds in each county in which the districts of said meadow companies shall extend.[7]

It shall also be lawful for the Court of Common Pleas of any county in which the major part of the lands of any meadow company may lie, upon the application of the said company to decree the consolidation of said company with any other meadow company controlling contiguous territory, whenever in the opinion of said court such consolidation would enure to the public interest; and the said decree shall be recorded in the office for recording

(5) Sec. 6, Act April 17, 1876, P. L., 33.
(6) See Sec. 1386.
(7) Sec. 1, Act May 15, 1893, P. L., 48.

deeds in each county in which the districts of said meadow companies shall extend.[8]

In case of consolidation of two or more meadow companies by agreement or by decree as aforesaid, the consolidated company shall be known by the name and be subject to all the provisions of the charter of that one of the original companies which controlled the larger territory prior to the consolidation.[9]

661. Merger and Consolidation of Railroad Companies Including Street Railway Companies.

City passenger railways are "railroads" within the meaning of the Act of May 16, 1861, P. L., 702.[10]

The Acts of May 16, 1861, P. L., 702, and March 23, 1865, P. L., 42, infra, relate to the merger and consolidation of domestic railroad corporations with similar companies. The Act of March 24, 1865, P. L., 49, relates to the merger and consolidation of companies one or both of which operate without the Commonwealth. As railroads are not within the scope of this work, and as street railways will seldom or never have occasion to merge under that act it is omitted herefrom.

It shall be lawful for any railroad company chartered by this Commonwealth, to merge its corporate rights, powers and privileges, into any other railroad company so chartered, connecting therewith, so that by virtue of this act such companies may be consolidated, and so that all the property, rights, franchises and privileges then by law vested in such company so merged, may be transferred to, and vested in the company into which such merger shall be made.[11]

Such consolidation and merger shall be made under the following conditions and restrictions, to-wit:

1. The directors or managers of each corporation may enter into a joint agreement, under the corporate seal of each company, for the consolidation of the said companies and of such merge[r], prescribing the terms and conditions thereof, and the manner of converting the capital stock of the said company so to be

(8) Sec. 2, Act May 15, 1893, P. L., 48.

(9) Sec. 3, Act May 15, 1893, P. L. 48.

(10) Hestonville M. & F. Pass. Ry. Co. *v.* Phila., 89 Pa., 210 (1879); Gyger *v.* Phila., etc. R. R. Co., 136 Pa., 96 (1890); Easton Transit Co. Op. Sec'y Com., 13 Pa. C. C., 518 (1893).

(11) Sec. 1, Act May 16, 1861, P. L., 702.

merged into the stock of the company into which such merger shall be made, and all other such provisions as they shall deem necessary to perfect the said consolidation and merger.

2. Said agreement shall be submitted to the stockholders of each of such companies, at a meeting thereof, called separately; of the time, place and object of which meeting due notice shall be given by publication once a week for two successive weeks, before said meeting, in one newspaper published in each of the counties through or into which the railroads of said companies respectively shall or may be authorized to extend; and at said meeting the said agreement shall be considered and a vote by ballot, in person or by proxy, taken, for the adoption or rejection of the same—each share entitling the holder thereof to one vote; and if a majority of all the votes cast at each of such meetings, shall be in favor of said agreement, consolidation and merger, then that fact shall be certified by the secretary of such company, and said certificate, together with a copy of the agreement, shall be filed in the office of the Secretary of the Commonwealth; whereupon the said agreement shall be deemed and taken to be the act of consolidation of said companies.[12]

Upon the filing of the said certificate and copy of agreement, in the office of the Secretary of the Commonwealth, the said merger shall be deemed to have taken place, and the said companies to be one corporation, possessing all the rights, privileges and franchises theretofore vested in either of them; and all the property, real, personal and mixed, and debts due and rights of action, shall be deemed and taken to be transferred to, and vested in the company into which such merger may have been made, without further act or deed; and all property, all rights of way, and all other interests, shall be as effectually the property of such company or corporation into which such merger may have been made, as they were of either of the former corporations, parties to said agreement: *Provided,* That all rights of creditors and all liens upon the property of either of said corporations, shall continue unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of either of said companies, shall thenceforth attach to the consolidated company, and may be enforced against it to the same extent, and by the same process, as if said debts, duties

(12) Sec. 2, Act May 15, 1861, P. L., 702.

and liabilities had been contracted by it: *And provided further,* That in case of any differences or inconsistencies of any nature, between the acts regulating said companies respectively, then the said consolidated company shall in all respects be regulated by the laws then governing and applicable to that company into which such merger may have been made: *And provided further,* That a certified copy of the said certificate and copy of agreement, so to be filed in the office of the Secretary of the Commonwealth, shall be evidence of the lawful holding and action of such meetings, and of the consolidation of said companies, and of the said merger: *And provided further,* That if any stockholder or stockholders of any railroad companies shall be dissatisfied with, or object to any such consolidation, then it shall and may be lawful for any such stockholder or stockholders, within thirty days after the execution of said agreement for consolidation, to apply by petition to the Court of Common Pleas of the county in which the chief office of the said companies may respectively be held, to appoint three disinterested persons to estimate and appraise the damage, if any, done to such stockholder or stockholders, by said proposed consolidation, and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise the share or shares of said stockholders in the said company, at the full market value thereof, without regard to any depreciation in consequence of the said proposed consolidation; and the said company may, at its election, either pay to the said holder the amount of damages so found, or the value of the stock so ascertained; and upon payment of the value of the stock as aforesaid, the said stockholders shall transfer the stock so held by them, to said company, to be disposed of by the directors of said company, or be retained by them for the benefit of the remaining stockholders.[12*]

662. Merged Railroad and Street Railway Companies May Issue Bonds.[13]

In all cases of merger or consolidation, of two, or more railroad companies, under and by virtue of the Act of Assembly, to which this is a further supplement, the company, into which such

(12*) Sec. 3, Act May 16, 1861, P. L., 702.
(13) See Note 7, p.

merger shall heretofore have been, or may be hereafter made shall have the power and authority to issue bonds, with coupons for interest, thereto attached, and to create a mortgage of all its property, real and personal, and, also of all its rights, privileges and franchises, to trustees, to secure the payment of the bonds so issued, and to give and exchange the said bonds, for the debts of the respective companies so merged or consolidated: *Provided,* That the bonds, so issued, shall not exceed, in amount, the whole of the debts of such companies, so merged, and that said bonds shall not bear a rate of interest of more than seven per centum per annum.[14]

The bonds, so issued, may be given in lieu, exchange and satisfaction of, and for, all bonds, mortgages, or other debts, or claims, against the companies thus merged and consolidated, upon such terms as may be agreed upon by and between the holders of such debts, or claims, and the company into which such merger, or consolidation, has taken place.[15]

663. Act of May 29, 1901 (P. L. 349).

Prior to the passage of the Act of May 29, 1901, there was, properly speaking, no provision for the consolidation and merger of corporations formed under the Act of April 29, 1874. The provisions of Sec. 5 of the Act of April 17, 1876, (See Sec. 588a) evidently contemplate sales, whereby the interests of one corporation were to be transferred, for a consideration, to another corporation, and do not contemplate consolidations whereby a union of corporate interests takes place, without consideration, between the corporations consolidating, while Sec. 6 of said act (See Sec. 658) relates only to corporations created prior to the passage of said act.

The said Act of 1901 is entitled "An act supplementary to an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, one thousand eight hundred and seventy-four; providing for the merger and consolidation of certain corporations." The first section of the act, however, provides that not only corporations formed under the Act of 1874 and its supplements may merge but also corporations organized under "any other act of

(14) Sec. 1, Act March 23, 1865, P. L., 41.
(15) Sec. 2, Act March 23, 1865, P. L., 41.

assembly authorizing the formation of corporations." This led the Attorney General to hold in the case of Bellevue & Perrysville Street Railway Company, 32 Pa. C. C., 243 (1906); 8 Dau. Co. Rep., 281, that railroads and passenger railways may be merged and consolidated under said act. The better opinion, however, would seem to be that the general language in the body of the act is limited by the language of the title, and that only corporations formed under the Act of 1874 and its supplements may be merged under the provisions of said act.

The Act of 1901, as will be noticed, follows very closely the language of the Railroad Merger Act of 1861. See Sec. 661, supra.

It shall be lawful for any corporation now or hereafter organized under, or accepting the provisions of, the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, or of any of the supplements thereto, or of any other act of assembly authorizing the formation of corporations, to buy and own the capital stock of, and to merge its corporate rights, powers and privileges with and into those of, any other corporation, so that by virtue of this act such corporations may consolidate, and so that all the property, rights, franchises and privileges then by law vested in either of such corporations so merged, shall be transferred to and vested in the corporation into which such merger shall be made: *Provided,* That nothing in this act shall be construed so as to permit railroad, canal, telegraph companies, which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine: *And provided further,* That any corporation formed for the purpose of carrying on any manufacturing business under the seventeenth or eighteenth clause of section two of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, with the powers conferred by section thirty-eight or section thirty-nine of said act, may be merged and consolidated, under the provisions of this act, with any other corporation formed for any purpose provided for in either the seventeenth or eighteenth clause of section two of the act above cited; but nothing in this act contained shall extend or enlarge beyond its former territorial limits the exclusive franchise of any gas or water company.[16]

(16) Sec. 1, Act May 29, 1901, P. L., 349.

Said merger or consolidation shall be made under the conditions, provisions and restrictions, and with the powers herein set forth, to-wit:

I. The directors of each corporation may enter into a joint agreement, under the corporate seal of each corporation, for the merger and consolidation of said corporations; prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and other officers thereof, and who shall be the first directors and officers and their places of residence, the number of shares of the capital stock, the amount or par value of each share, and the manner of converting the capital stock of each of said corporations into stock of the new corporation, and how and when directors and officers shall be chosen with such other details as they shall deem necessary to perfect the said consolidation and merger; but said agreement shall not be effective unless the same shall be approved by the stockholders of said corporations, in the manner hereinafter provided.

II. Said agreement shall be submitted to the stockholders of each of said corporations, at separate special meetings, of the time, place and object of which respective meetings due notice shall be given by publication, once a week for two successive weeks before said respective meetings, in at least one newspaper in the county or each of the counties in which the principal offices of said respective corporations shall be situate; and at said meetings the said agreement of the directors shall be considered, and a vote of the stockholders in person or by proxy shall be taken, by ballot, for the adoption or rejection of the same, each share of stock entitling the holder thereof to one vote; and if a majority in amount of the entire capital stock of each of said corporations shall vote in favor of said agreement, merger and consolidation, then that fact shall be certified by the secretary of each corporation, under the seal thereof, and said certificates, together with the said agreement or a copy thereof, shall be filed in the office of the Secretary of the Commonwealth, whereupon the said agreement shall be deemed and taken to be the act of consolidation of said corporations.[17]

Upon the filing of said certificates and agreement, or copy of agreement, in the office of the Secretary of the Commonwealth,

(17) Sec. 2, Act May 29, 1901, P. L., 349.

the said merger shall be deemed to have taken place, and the said corporation to be one corporation under the name adopted in and by said agreement, possessing all the rights, privileges and franchises theretofore vested in each of them, and all the estate and property, real and personal, and the rights of action of each of said corporations, shall be deemed and taken to be transferred to and vested in the said new corporation without any further act or deed: *Provided,* That all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of each of said constituent corporations shall thenceforth attach to the said new corporation, and may be enforced against it to the same extent and by the same process as if said debts, duties and liabilities had been contracted by it. But such merger and consolidation shall not be complete, and no such consolidated corporation shall do any business of any kind, until it shall have first obtained from the Governor of the Commonwealth new letters patent, and shall have paid to the State Treasurer a bonus of one-third of one per centum on all its corporate stock in excess of the amount of capital stock of the several corporations so consolidating, upon which the bonus required by law had been theretofore paid: *And provided further,* That new letters patent of such consolidated corporation shall not be issued by the Governor of the Commonwealth until each and every corporation, entering and forming the consolidated corporation, shall have filed with the Secretary of the Commonwealth a certificate from the Auditor General of the Commonwealth, setting forth that all reports required by the Auditor General of the Commonwealth have been duly filed, and that all taxes due the Commonwealth of Pennsylvania have been paid.[18]

A certified copy of said certificate and agreement, or copy of agreement, so to be filed in the office of the Secretary of the Commonwealth, shall be evidence of the lawful holding and action of such meetings, and of the merger and consolidation of said corporations.[19]

If any stockholder or stockholders of any corporation which

(18) Act of March 31, 1905, P. L., 95, amending Sec. 3, Act May 29, 1901, P. L., 349.

(19) Sec. 4, Act May 29, 1901, P. L., 349.

shall become a party to an agreement of merger and consolidation hereunder, shall be dissatisfied with or object to such consolidation, and shall have voted against the same at the stockholders' meeting, it shall and may be lawful for any such stockholder or stockholders, within thirty days after the adoption of said agreement of merger and consolidation by the stockholders as herein provided, and upon reasonable notice to said corporation, to apply by petition to any Court of Common Pleas of the county in which the chief office of such corporation may be situate, or to a judge of said court in vacation, if no court sits during said period, to appoint three disinterested persons to estimate and appraise the damages, if any, done to such stockholder or stockholders by said consolidation. Upon such petition, it shall be the duty of said court, or judge, to make such appointment; and the award of the persons so appointed, or of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise the share or shares of said stockholders in the said corporation, at the full market value thereof, without regard to any appreciation or depreciation in consequence of the said consolidation, which appraisement, when confirmed by the said court, shall be final and conclusive; and the said corporation may, at its election, either pay to the said stockholder or stockholders the amount of damages so found and awarded, if any, or the value of the stock so ascertained; and upon the payment of the value of the stock as aforesaid, the said stockholder or stockholders shall transfer the stock so held by them to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the other stockholders; and in case the value of said stock, as aforesaid, shall not be so paid within thirty days after the said award shall have been confiremd by said court, the damages so found and confirmed shall be a judgment against said corporation, and may be collected as other judgments in said court are by law recoverable.[20]

664. Construction of the Act of May 29, 1901.

An artificial gas company and an electric light company may

(20) Sec. 5, Act May 29, 1901, P. L., 349. The remedy for a dissenting stockholder provided for in this section is not exclusive. Barnett *v.* Phila. Market Co., 218 Pa., 649 (1907).

merge under the provisions of the Act of May 29, 1901, P. L., 349. Such a merger is not in violation of the tenth section of article sixteen, of the Constitution, which provides that "No law hereafter enacted shall create, renew or extend the charter of more than one corporation," such merger not being the creating, renewing or extending a charter. The rule of the Law Department of the Commonwealth respecting the formation of corporations with but a single purpose, relates to and affects only the granting of charters. When, however, corporations are once in being, and the Legislature has in plain language authorized a merger of rights and property by companies created under a designated act, and such merger and consolidation is not affected by constitutional limitation, there is nothing left for a court but to declare that corporations, circumstanced as the defendants are, may lawfully merge and consolidate.[21]

665. Railroad and Canal Companies Controlling Competing Lines May Not Consolidate.

No railroad, canal or other corporation of this State, or the lessees, purchasers or managers of any such railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or hold a majority of the stock of, or in any other way control, any other railroad or canal corporation, organized under the laws of this State, owning or having under its control within this State a parallel or competing line; nor shall any officer of such railroad or canal corporation of this State act as an officer of any other railroad or canal corporation of this State, owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues: *Provided,* That none of the prohibitions of this act shall apply where one railroad or canal corporation owns a majority of the stock of another railroad or canal corporation, which it held before the adoption of the present Constitution, nor where a railroad corporation has furthered or shall further the construction of a line, parallel and competing with its

(21) Com. *v.* Huntingdon Gas Co. and Huntingdon Electric Light Co., 5 Dauph. Co. Rep., 204 (1902).

own, by subscribing to a majority of the stock of a corporation organized for that purpose.[22]

Any violation or attempted violation of the provisions of this act may be attacked or restrained by appropriate proceedings at law or in equity, at the instance of the Commonwealth acting through the Attorney General, and that any such violation shall also constitute a misdemeanor, for which the offending corporation, as well as the president, vice-president and members of the board of directors participating therein, may be indicted and punished, separately or collectively.[23]

Under the Act of May 29, 1901, P. L., 349, three companies chartered to supply the same territory with gas for light only, gas for all purposes other than light, and light, heat and power by means of electricity, respectively, may be merged and consolidated.[24]

The Act of May 29, 1901, P. L., 349, does not authorize an increase of capital by means of a merger agreement. Any increase in capital over the aggregate amounts of the capital stocks of the merging companies must be made under the Act of February 9, 1901, P. L., 1, either by one or more of the merging companies taking the necessary steps before merger, or by action of the consolidated company after merger.[25]

The Act of May 29, 1901, P. L., 349, does not authorize the merger of corporations formed for different purposes. Hence a water company may not consolidate with an electric light, heat and power company.[26] But an injunction to restrain such consolidation will be refused when the variances in the nature of their franchises are set forth in the bill only in general terms and the charters are not exhibited.[27]

666. Status of Dissenting Stockholders.

Where by act of assembly it was provided that one railroad

(22) Sec. 1, Act April 4, 1901, P. L., 61.

(23) Sec. 2, Act April 4, 1901, P. L., 61.

(24) Motter *v.* Kennett Township Elec. Co., 212 Pa., 613 (1905).

(25) Stroudsburg & Bushkill Telephone Co., Op. Atty. Gen., 16 D. R., 601 (1907). *Contra.* Lehigh Valley Pass. Ry. Co., Op. Atty. Gen., 32 Pa. C. C., 578 (1906).

(26) Hummelstown Water Co., Op. of the Governor, 32 Pa. C. C., 593 (1906); 15 D. R., 532.

(27) Barnett *v.* Market Co., et al., 14 D. R., 617 (1905).

company should merge with another, upon a majority of the stockholders of said corporation voting for the merger, it was held that a dissenting stockholder had no status to prevent such merger, but that he was not required to exchange his stock for stock in the company formed by the merger. Before the merger can take place, the stockholder must be secured for the value of his stock, to be paid to him when ascertained.[28]

Stockholders dissenting to a merger under the provisions of the Act of May 29, 1901, P. L., 349, are entitled to be paid the full value of their stock as of the time, immediately prior to the consolidation, and the consolidating corporations will be ordered to enter security for such payment.[29]

Where a corporation has been consolidated and merged with another the remedy of a dissatisfied stockholder who has not voted against the consolidation to ascertain the value of his stock and to enforce payment thereof is by a bill in equity, and not by proceedings under the Act of May 29, 1901, P. L., 349, and even if such stockholder voted against the consolidation, he is not confined to the remedy provided by said act. The protection given to the stockholder in Lauman *v.* Lebanon Valley R. R. Co., 30 Pa., 42, is still to be found in Chancery, assuring him actual payment for his stock, if he is compelled to part with it, instead of a judgment against the corporation for the value of it, to be collected as other judgments are by law recoverable.[29*]

667. A Consolidation is Not a Dissolution, and Suits Brought Before Consolidation Are Not Abated Thereby.

An act of union or consolidation of a defendant corporation with three other corporations, under a law which continues all its liabilities, is not such a dissolution of the corporation as abates an action against said company, begun before the consolidation was effected. "The law says the liabilities shall continue or be assumed by the consolidated company. If they were assumed, then the new company must attend to the suit and answer the judgment, for that was one of the liabilities by which this corporation

(28) Lauman *v.* Lebanon Valley R. Co., 30 Pa., 42 (1858). See, however, Toland *v.* Bethlehem Iron Co., 27 Pa. C. C., 666 (1902).

(29) Barnett *v.* Phila. Market Co. et al., 218 Pa., 649 (1907); 14 D. R., 617 (1905). See Fame & W. Hose Co.'s Appeal, 6 Leg. Gaz., 79 (1874).

(29*) Barnett *v.* Phila. Market Co., 218 Pa., 649 (1907).

was bound, so *quacunque via,* the suit does not abate. But without any such provision as the above, in the law authorizing the consolidation, a court of justice would not consider the mere voluntary consolidation of several corporations into one as equivalent to the death of either of them." [30]

668. There Must be Legislative Authority for Mergers and Consolidations.

To merge one corporation into another there must be legislative authority therefor, and the members of the corporation must act upon the proposition to merge. The directors have no authority to effect a merger.[31]

669. Subscriptions to Stock of the Consolidated Companies.

Where two corporations merge, payment of unpaid subscriptions to the stock of one of the companies may be compelled by bill in equity at the instance of the creditors of the consolidated company. By force of the articles of consolidation, and the acts of assembly, the subscriptions to the stock of one of the prior companies inure to the benefit of the consolidated company, so as to become assets in its hands for the payment of its debts, and the subscribers thereof become liable to the creditors to the amount of their unpaid subscriptions.[32]

Three existing companies were consolidated. A subscription was made after the agreement for consolidation, but before the articles of such agreement were filed in the office of the Secretary of the Commonwealth. Held, that the filing of the agreement in the office of the Secretary was not necessary to validate the subscription.[33]

670. Passenger Railway Companies are "Railroads" Within the Meaning of the Act of May 16, 1861.

City passenger railway companies are "railroads" within the meaning of the Act of May 16, 1861, P. L., 702, providing for

(30) Balto. & Susq. R. Co. *v.* Musselman, 2 Grant, 348 (1856).

(31) Temperance Mut. Ben. Assn. *v.* Home Friendly Society, 187 Pa., 38 (1898); Home Friendly Soc. *v.* Tyler, 9 Pa. C. C., 617 (1891).

(32) Hamilton *v.* Clarion, Mahoning & Pitts. R. Co., 144 Pa., 34 (1891).

(33) McClure *v.* People's Freight Ry. Co., 90 Pa., 269 (1879). See Com. *v.* Atlantic and Great Western Ry. Co., 53 Pa., 1 (1866).

the merger of railroad companies, and may be merged under the provisions of said act.[34]

671. Liability of the Corporation Formed by the Consolidation.

A railroad company formed by the consolidation of two or more railroad companies is responsible for the debts and liabilities of the merged companies arising prior to the consolidation.[35]

(34) Hestonville, Mantua & F. Pass. R. Co. *v.* Phila., 89 Pa., 210 (1879).

(35) Root *v.* Oil Creek & A. R. Co., 2 Foster, 145 (1874); Lathrop *v.* Junction R. Co., 9 W. N. C., 277 (1879).

CHAPTER XXIX.

DISSOLUTION OF CORPORATIONS.

672. Dissolution by Expiration of Period Fixed by Charter.
673. Courts of Common Pleas May Decree Dissolution of Corporations.
674. A Dissolution of Corporations or Commissions not for Profit, Incorporated to Maintain Turnpike and Public Roads.
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693. Dissolution of Charitable Associations.
694. Dissolution by Proclamation of the Governor, under the Provisions of the Acts of April 24, 1874, and March 20, 1877.
695. Dissolution Dissolves Attachments Against Corporations.
696. Suits May be Brought After Dissolution.
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698. Dissolution of Manufacturing, Mining, Mechanical, etc., Corporations.
699. To Enable Mining, Manufacturing and Trading Companies to Wind up their Affairs.
700. Dissolution of Insolvent Insurance Companies.

672. Dissolution by Expiration of Period Fixed by Charter.

At the expiration of the time fixed by its charter as the period of its existence, a corporation ceases to exist. No action on the part of any one is necessary to effect its dissolution. It ceases to have a *de facto,* as well as a *de jure* existence.[1]

673. Courts of Common Pleas May Decree Dissolution of Corporations.

It shall be lawful for any Court of Common Pleas of the proper county to hear the petition of any corporation, under the seal thereof, by and with the consent of a majority of a meeting of the corporators, duly convened, praying for permission to surrender any power contained in its charter, or for the dissolution of such corporation; and if such court shall be satisfied that the prayer of such petition may be granted without prejudice to the public welfare, or the interests of the corporators, the court may enter a decree in accordance with the prayer of the petition, whereupon such power shall cease, or such corporation be dissolved: *Provided,* That the surrender of any such power shall not in any wise remove any limitation or restriction in such charter, and that the accounts of the managers, directors or trustees of any dissolved company shall be settled in such court and be approved thereby; and dividends of the effects shall be made among any corporators entitled thereto, as in the case of the accounts of assignees and trustees: *Provided further,* That no property devoted to religious, literary or charitable uses shall be diverted from the objects for which they were given or granted: *Provided,* That the decree of said court shall not go into effect until a certified copy thereof be filed and recorded in the office of the Secretary of the Commonwealth.[2]

674. Dissolution of Corporations or Commissions, Not for Profit, Incorporated to Maintain Turnpikes and Public Roads.

The several Courts of Common Pleas be and they are hereby authorized to decree the dissolution of corporations and commissions, not for profit, heretofore or hereafter incorporated for the purpose of repairing, maintaining, and operating turnpike and other public roads, with the right to collect toll thereon, and levy

(1) Kehr's Petition, 23 Pa. C. C., 460 (1900).
(2) Act April 9, 1856, P. L., 293.

tax for the maintenance of such roads and the payment of the interest and principal of indebtedness legally created, and to determine the manner in which the affairs of such corporations or commissions may be wound up.[3]

Upon the presentation of a petition by the directors, commissioners, or trustees, or a majority of them, of any such corporation or commission, to the Court of Common Pleas, or, in vacation, to a judge thereof, within whose district a turnpike or other public road shall be wholly, or the greater part thereof, located, setting forth the location and character of the road, the length thereof, and that they are of opinion that the corporation or commission should be relieved of the duty of repairing and maintaining and operating the road under its control, and that it is to the public interest that the control thereof shall be surrendered by the said corporation or commission; and further setting forth a full statement of the indebtedness of the corporation or commission, the manner in which and by what authority said indebtedness was created, and whether said corporation or commission is empowered by law to levy and collect road taxes, and, if so, the amount and rate of such taxes and the purpose for which the same are authorized to be levied and collected, and such other matters as may be necessary to inform the court fully as to the status of the corporation or commission, and the condition of the turnpike or other public road under its control, the court may, after such examination of the truth of the matters alleged in the petition as they may deem requisite, make a decree removing said turnpike or other public road from the authority and control of such corporation or commission, and declaring the same to be a free public highway, to be controlled and maintained as other highways in cities, boroughs, and townships are controlled and maintained; and said court shall, thereupon, require the said corporation or commission to continue to levy and collect the road tax, authorized by law to be levied and collected by such corporation or commission, for such number of years, and at such rate per year, as the court shall deem requisite for the full payment of the debt and interest which the court shall find is outstanding and unpaid. The court may further order that the said corporation or commission shall make annual report to the court of the amount of tax collected, and the amount of indebtedness liqui-

(3) Sec. 1, Act June 1, 1907, P. L., 375.

dated, and amount of interest paid thereon. When it shall appear to the court from such reports, or otherwise, that all outstanding indebtedness has been fully paid, the court shall make a final decree dissolving the said corporation or commission, and discharging the officers, directors, commissioners, or trustees, as the case may be.[4]

675. Dissolution of Mining Companies Not Operated for Ten Years.

Whenever any corporation organized for the purpose of mining for petroleum or other products and marketing the same, and owning real estate in any county of this Commonwealth, shall have been in existence for a period of thirty years or longer, and for the period of ten years or more prior to the passage of this act shall not have been engaged in the business of such mining nor have earned and distributed to the shareholders thereof any dividends out of its net earnings, it shall be the duty of the Courts of Common Pleas of any county in which such real estate may be situated, upon the petition of the owner or owners of not less than one-third of the capital stock of any such corporation, and after personal notice to other known stockholders resident within the county, and notice to all others interested, by advertisement, in at least one newspaper of general circulation published within the county, for not less than two months, if the facts alleged in the petition be not denied, or, if denied, shall be found by the court to be true, to order and decree a dissolution of such corporation, and to order and direct the sale of the real estate thereof by a trustee to be appointed for that purpose, and to decree distribution of the proceeds of such sale or sales to and among creditors or shareholders entitled thereto, in the same manner that the real estate of other dissolved corporations is now sold and the proceeds thereof distributed under the discretion of said courts.[5]

676. Corporations Not to be Dissolved Nor Their Property Sold at Judicial Sales Until All State Taxes Have Been Paid.

No corporation, company, joint stock association, association or

(4) Sec. 2, Act of June 1, 1907, P. L., 375. This act was passed to cover the case of the Fort Hunter Turnpike Company, of Dauphin county, incorporated by Act of March 29, 1870, P. L., 665, and January 27, 1871, P. L. 10.

(5) Act of March 27th, 1903, P. L., 79.

limited partnership, made taxable by this act, shall hereafter be dissolved by the decree of any Court of Common Pleas, nor shall any judicial sale be valid or a distribution of the proceeds thereof be made until all taxes due the Commonwealth have been fully paid into the State treasury, and the certificate of the Auditor General, State Treasurer and Attorney General to this effect filed in the proper court with the proceedings for dissolution or sale.[6]

677. Corporations of Any Class May Be Dissolved Under the Provisions of the Act of April 9, 1856.

The Act of April 9, 1856, P. L., 293, is the first to provide for the dissolution of corporations by Courts of Common Pleas. Because the title of this act is "A supplement to the acts relating to incorporations by Courts of Common Pleas," it was contended in Com. *v.* Slifer, 53 Pa., 71 (1866) that only such corporations could be dissolved by Courts of Common Pleas, under said act, as were formed by such courts. Held, however, that said act did not restrict the power of the Courts of Common Pleas to dissolve corporations, to any class of corporations; that the thirty-seventh section of the Act of July 18, 1863, expressly brings companies formed under said act within the provisions of the Act of April 9, 1856; that the county in which a company has its principal office is the "proper county," under the Act of 1856; and that it is the duty of the Secretary of the Commonwealth to file in his office the decree of Courts of Common Pleas dissolving corporations formed under the said Act of 1863. Corporations formed under the provisions of the Act of April 29, 1874, may be dissolved under the provisions of said act.[7]

678. Proceedings for Dissolution Conform to the Practice in Equity.

The Act of April 9, 1856, P. L., 293, providing for the dissolution of corporations, refers to the equity jurisdiction given by the Act of 1836, so that the petition must be regarded as a bill, and the proceedings conform to the practice in equity.[8]

(6) Sec. 32, Act June 1, 1889, P. L., 437.

(7) New Castle Wire Nail Co.'s Case, 18 Pa. Super. Ct., 257 (1901). See Credit Mobilier Case, 10 Phila., 2 (1873).

(8) Titusville Oil Exchange's Dissolution, 2 Super. Ct., 508 (1896); 8 Pa. Super. Ct., 304 (1898); 10 Pa. Super. Ct., 496 (1899).

679. Dissolution Not a Corporate Act.

"The dissolution of a corporation, like the act of association, is not a corporate act, but an act of the members of the corporation.[9] They may commit to their officers the business of effecting it in all its details, but they are not required to do so by the terms of their association, and, in effecting such a purpose, the officers would be rather trustees of the members than corporate functionaries. Then it follows, quite obviously, that no corporate act can settle the terms of dissolution or distribute the effects among the members, and that this company cannot decide what the plaintiff (a dissenting stockholder) shall take for his interest." Such dissenting stockholder cannot be compelled by law to accept the stock of another company in payment of his own shares where his corporation sells out to another corporation.[10]

680. Liquidating Trustee.

The stockholders of a corporation, like members of a partnership, company or association, may, by permitting a person to act for and represent the corporation in all matters pertaining to the collection of debts, payment of liabilities, settlement of accounts, distribution of proceeds and doing other acts pertaining to the winding up of the business, confer by acquiescence and consent such powers upon the person so acting as will constitute him a liquidating trustee, within the meaning of the law, and notice to such trustee is notice to the corporation.[11]

681. The Proper County in Which to Make Application for Dissolution.

The "proper county" intended by said Act of April 9, 1856, approved as aforesaid, may be, at the option of any corporation praying for permission to dissolve, either the county in which the principal operations of the corporation are conducted, or that county in which its principal office or place of business is located: *Provided,* That notice of such application shall be given,

(9) In Marietta B. & L. Assn.'s Case, 10 Lanc. Bar, 37 (1878), however, it was held that a petition for dissolution must be made by the corporation under the seal thereof, and that a petition by the stockholders is not sufficient.

(10) Lauman *v.* Lebanon Valley R. Co., 30 Pa., 42 (1858); Pottsville Bank v. Minersville Water Co., 211 Pa., 566 (1905).

(11) Pottsville Bank *v.* Minersville Water Co., 211 Pa., 566 (1905).

by publication in two newspapers in the county in which the principal operations are conducted, and that in which the principal office is located.[12]

It seems that a domestic corporation having its principal office and place of business outside of the State may not be dissolved under the Act of April 9, 1856.[13]

682. Notice of Application for Dissolution.

Where a corporation conducted all its business in one county, but held meetings of its directors in another county where an office was maintained solely for the convenience of the officers and directors residing in the latter county, advertisements were required to be made in both counties.[14]

Notice of an application for dissolution should be published for three weeks—in Philadelphia county, at least.[15]

In the case of a religious corporation it was held that the petition for dissolution should be advertised for two weeks, twice a week, and that the notice should state the day whereon the application was to be made.[16]

683. Action of the Stockholders on Propositions to Dissolve.

Meetings held to pass upon a proposal to dissolve must be held in a regular manner, with due notice to the stockholders to attend.[17] "In the absence of direction on this point, the shortest notice of election for any purpose directed by later statutes reasonably indicates the minimum period with which this omission should be supplied." [18]

A majority of the stockholders may dissolve it.[19]

(12) Act of April 4, 1872, P. L., 40.

(13) Credit Mobilier Case, 10 Phila., 2 (1873). "The Act of 1872 clearly contemplates the location of the principal office or the transaction of the chief part of its business in one or the other of the counties of Pennsylvania, as determining the 'proper county' in which to make application under the Act of 1856." Ibid.

(14) S. Ashton Hand Mfg. Co., 5 Pa. C. C., 400 (1888); 22 W. N. C., 23.

(15) In re Phila. Straw Braid Sewing Machine Co., 6 Pa. C. C., 65 (1888).

(16) St. Ambrose Church, 4 Pa. C. C., 272 (1887).

(17) Titusville Oil Exchange *v.* Witherop, 2 Super. Ct., 508 (1895); Bethlehem *v.* Perseverance Fire Co., 3 W. N. C., 104 (1876).

(18) Titusville Oil Exchange *v.* Witherop, 2 Super. Ct., 508 (1895).

(19) Titusville Oil Exchange *v.* Witherop, 2 Super. Ct., 508 (1895); McCurdy *v.* Myers, 44 Pa., 535 (1863). As to how far they may bind dissenting stockholders see Sec. 679.

683a. When Decrees of Dissolution Should and Should Not be Granted.

A decree of dissolution will not be granted in any case where the same would prejudice the public welfare and the interests of the corporators as well as creditors.[20]

Where there is any question as to the regularity of the adoption of the resolution to dissolve, the court will not grant a decree without giving the respondents alleging such irregularity an opportunity to show the truth of their allegations.[21]

A decree of dissolution will not be granted because owing to the withdrawal of members of a building association a sufficient number of members is not left to constitute a quorum.[22]

A court will not set aside a decree of dissolution entered at the instance of the corporation, on the ground that an action of trespass was pending at the time of the entry of said decree, where it appears that the plaintiff in such action has unreasonably delayed in moving to set the same aside.[23]

684. Courts May Supervise Elections to Pass Upon Proposed Dissolution.

Courts may, in the exercise of equity powers, supervise elections held to pass upon the question of the dissolution of corporations.[24]

685. Dissolution Not Effected by Failure to Elect Officers on Charter Day.

Dissolution of corporations is not effected by an omission to continue the succession to certain offices which constitute an integral part of their bodies, provided that these offices be supplied with officers *de facto*.[25] Managers and officers do not form an integral part of a corporation, and an omission to elect them at the time appointed by the charter will not dissolve the corporation,

(20) Credit Mobilier's Petition, 10 Phila., 2 (1873).

(21) Titusville Oil Exchange's Dissolution, 2 Pa. Super. Ct., 508 (1896).

(22) Kelly *v.* Building Association, 1 W. N. C., 218 (1875).

(23) New Castle Wire Nail Company's Case, 18 Pa. Super Ct., 257 (1901).

(24) Titusville Oil Exchange *v.* Witherop, 2 Super. Ct., 508 (1895).

(25) Lehigh Bridge Co. *v.* Lehigh Coal & Nav. Co., 4 Rawle, 9 (1833).

though its functions may be suspended thereby and restored by subsequent elections.[26]

686. Corporations Not Dissolved by Sheriffs' Sales, Under Act of of April 7, 1870.

A corporation, as a distinct corporate existence, is not dissolved or extinguished by a sheriff's sale of its rights and franchises, under the Act of April 7, 1870. [27]

A corporation conveying its property and franchises to another corporation, the stock of which it receives in return, for its members, becomes merged in such other corporation and is itself dissolved.[28]

687. Distribution of the Assets of Dissolved Corporations.

The equity power to dissolve corporations involves the distribution of the assets, and the court may decree the sale of both real and personal estate. No appeal lies from an order for the sale of real estate of a dissolved corporation, but only from the decree confirming the sale.[29]

The rights of creditors of an insolvent corporation become fixed by a decree of court decreeing the dissolution thereof. No rights can be subsequently acquired by a creditor which will entitle him to a larger participation in the assets of such insolvent corporations.[30]

688. Compulsory Dissolution for Misuser or Non-user.

"Mr. Justice Story, in delivering the judgment of the Supreme Court of the United States in Mumma *v.* Potomac Company, held

(26) Rose *v.* Tpk. Co., 3 Watts, 46 (1834). See Com. *v.* Cullen, 13 Pa., 142 (1850). Prior to these decisions, the belief must have been general that a failure to elect officers on charter day worked a dissolution of the corporation, because scores of special acts of incorporation provide elaborately that such failure shall *not* work a dissolution.

(27) Reifler *v.* Honesdale & Del. Plank Rd. Co., 1 Pa. C. C., 64 (1886). See In re International Coal Mining Co., U. S. Dist. Ct., 15 D. R., 669 (1906); U. S. Circ. Ct. Ap., 16 D. R., 212 (1906); *Contra* Germantown Pass. Ry. Co. *v.* Fitler, 60 Pa., 124 (1869).

(28) Lauman *v.* Lebanon Valley R. Co., 30 Pa., 42 (1858).

(29) Titusville Oil Exchange's Dissolution, 10 Pa. Super. Ct., 496 (1899).

(30) Dean & Sons' Appeal, 98 Pa., 101 (1881). See Sec. 559, as to distribution of estates of insolvent corporations.

that 'A corporation by the very terms and nature of its political existence, is subject to dissolution by forfeiture of its franchises for wilful misuser or non-user.' 8 Peters, 287. Many years before that decision was pronounced, the same principle was fully recognized by the same high authority in Truett et al. *v.* Taylor et al., 9 Cranch, 43, where the right of forfeiture for misuser or non-user was held to be the 'common law of the land, and a tacit condition annexed to the creation of every corporation.' It is now well settled by numerous authorities that it is a tacit condition of a grant of a corporation that the grantees shall act up to the end or design for which they were incorporated, and hence, through neglect or abuse of the franchises, a corporation may forfeit its charter, as for condition broken or for a breach of trust. See Angell & Ames on Corporations, p. 660, and the cases there cited. . . . . It may be assumed as a general principle that where there has been a misuser or a non-user, in regard to matters which are of the essence of the contract between the corporation and the State, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture." [31]

Where the charter of a corporation provided "If the said company abuse or misuse any of the privileges hereby granted, the Legislature may resume the rights granted to the said company," held, that as soon as the privileges were misused the general assembly was invested with full power to repeal the charter, and the corporators held their franchise from the State merely as tenants at will, in the same manner as if there had been an unconditional reservation of the right to repeal. The power to repeal for an abuse of corporate privileges is a different right from that of demanding a judicial sentence of forfeiture, and is reserved for the very reason that it may afford a remedy when quo warranto would not. It is not necessary, in such case, that the fact of misuser should first be ascertained by a judicial trial.[32]

689. Sale of Real Estate of Dissolved Corporations.

Whensoever it has occurred or shall happen that any corporation has been or shall be dissolved, whether by decree of court, expiration of time or otherwise, owning land or other real estate

(31) Com. *v.* Commercial Bank, 28 Pa., 383 (1857). See Secs. 44 and 523.

(32) Erie & N. E. R. Co. *v.* Casey, 26 Pa., 287 (1856). See Sec. 44.

within this Commonwealth, it shall and may be lawful for the Court of Common Pleas of the county wherein the real estate is, or shall be located, upon the petition of any one or more of the shareholders or corporators or their legal representatives, and personal notices to and service upon all known parties in interest whose places of residence are known, and such further notice by advertisement to others interested as the court may direct, if no reasonable and sufficient cause be shown to the contrary, to authorize the sale of such real estate, in fee simple, at either public or private sale, upon such terms as the court may designate, by a trustee to be appointed for that purpose, which trustee, before making such sale, shall give security for the faithful application of the proceeds of such sale according to law, to be approved by the court, in double the probable value of the land to be sold, and the proceeds of such sale shall be distributed by the party making the same as part of the effects of the defunct corporation, to creditors or shareholders, as the said court may adjudge them to be entitled, and if said corporation has made sale of real estate and had not conveyed the same, such court may decree conveyance in specific execution of such contract in manner aforesaid.[33]

A person who has bought stock of a corporation after the termination of its corporate existence by the expiration of the time fixed in its charter, has a standing to apply for a sale of the company's real estate under the provisions of the Act of April 19, 1891, supra.[34]

A trustee appointed by a court under the Act of April 15, 1891, P. L., 15, may sell the right to redeem lands sold for taxes, vested in a dissolved corporation, the same being an interest in real estate.[35]

690. Disposition of Property of Corporations Dissolved by Quo Warranto.[36]

691. Fraudulent Dissolution.

Where certain parties fraudulently represented that the entire stock and assets of a corporation belonged to them, and

(33) Act April 15, 1891, P. L., 15, amending the Act of June 25, 1885, P. L., 178, which amended the Act of April 20, 1874, P. L., 110.

(34) Kehr's Petition, 23 Pa. C. C., 460 (1900).

(35) Phila. *v.* Unknown, 30 Pa. Super. Ct., 516 (1906).

(36) See Secs. 510, 511, 512.

thereby secured a decree of court dissolving said corporation, and thus acquired a possession of its assets, held, that they were liable in equity to be decreed trustees ex maleficio, as respected *bona fide* stockholders.[37]

692. Dissolution of Corporations of the First Class Improvidently Incorporated.

Though a corporation of the first class, when incorporated by a Court of Common Pleas, can be compulsorily dissolved only by proceedings in quo warranto, yet, when a charter has been improvidently granted, not being authorized by any act, the order of the court incorporating the same may be revoked.[38]

693. Dissolution of Charitable Associations.

A voluntary association of individuals who have contributed funds for a purely public purpose will be regarded as a charity. The principles applicable to the distribution of the assets of a business corporation, upon its dissolution, do not apply to the distribution of the assets of a corporation organized for charitable purposes. The members of such charitable corporation hold the assets in trust for the public. On the dissolution of a fire company, its assets belong to the public, and to distribute them among the members is a perversion of the trust upon which they were donated.[39] But on the dissolution of a beneficial society against which a judgment of ouster has been entered the funds thereof do not escheat to the Commonwealth.[40]

A society for the visitation of the sick and burial of the dead may not be dissolved for the purpose of dividing its property among its members.[41]

A court in disposing of the assets of a charitable association, which has ceased to do business, will not necessarily be governed by the wishes of the persons who contributed to the association, but may decree that the same shall be given to a society the objects of which, in the opinion of the court, are nearer to those of the de-

(37) Bailey's Appeal, 96 Pa., 253 (1880).

(38) National Indemnity and Endowment Co., 142 Pa., 450 (1891).

(39) Humane Fire Company's Appeal, 6 W. N. C., 442 (1878). See Bethlehem Borough *v.* Perseverance Fire Co., 81 Pa., 445 (1876).

(40) Com. *v.* Order of Solon, 192 Pa., 498 (1899).

(41) Mayer *v.* Soc. for the Visitation of the Sick, etc., 2 Brewst., 385 (1868).

funct corporation than the association suggested by the contributors.[42]

694. Dissolution by Proclamation of the Governor Under the Provisions of the Acts of April 24, 1874, and March 20, 1877.

Sec. 3 of the Revenue Act of April 24, 1874, P. L., 68, and Sec. 2 of the Revenue Act of March 20, 1877, P. L., 6, provide that "if said officers of any such company or corporation shall intentionally fail to comply with the provisions of the second section of this act for three successive years, the Auditor General shall report the fact to the Governor, who, if he be made satisfied such failure was intentional, shall thereupon by proclamation, declare the charter of said company or corporation forfeited, and its chartered privileges at an end; whereupon the same shall cease, end and be determined." Under these provisions the Governor of the Commonwealth declared a large number of corporations to have forfeited their charters, by his proclamation, in 1883, for failure to make reports and pay taxes for three years. Many of these corporations have continued to do business without regard to such alleged forfeiture, and the best opinion is, that corporate franchises cannot be forfeited by any such summary method.[43]

695. Dissolution Dissolves Attachments Against Corporations.

Where corporations are dissolved before judgment in attachment proceedings, the attachments are dissolved,[44] but when an action has been begun, the corporation duly summoned and judgment entered by default, if the judgment be opened and an issue awarded on the merits, the dissolution of the corporation pending the proceedings will not prevent a judgment against it.[45]

696. Suits May be Brought After Dissolution.

Suits may be brought in the name and to the use of corporations after dissolution. "Neither the expiration of a charter nor the dis-

(42) Com. *v.* Pauline Home, 141 Pa., 537 (1891).

(43) An opinion of a Deputy Attorney General (Attorney Gen.'s Rep., 1895-6, p. 390), dated June 20, 1883, is the only authority in support of the validity of these forfeitures. The Act of April 14, 1905, P. L., 166, imposes a penalty of $500 for failure to make tax reports for three years.

(44) Frailey *v.* Central Fire Ins. Co., 9 Phila., 219 (1874); Farmers' & Mechanics' Bank *v.* Little, 8 W. & S., 207 (1844).

(45) McAnulty *v.* National Life Assn., 6 Lack. L. N., 128 (1900).

solution of a corporation works a release of obligations due to it, but they continue in full vigor, and may be collected by officers duly authorized by law to take charge of its assets and distribute them among the parties thereto. Such officers are likened to the administrators of dead men or the committees of lunatics." [46]

But when the charter of a building and loan association has expired by limitation, and no attempt is made to renew or extend its charter, a new corporation formed with the same name as the old cannot sue on a mortgage given to the old association by one who did not become a member of the new corporation, although the new association has physical possession of the mortgage and other papers of the old corporation and occupies the same office.[47]

697. Opening of Decrees of Dissolution.

A decree of dissolution will not be opened at the instance of a plaintiff in an action of trespass against the dissolved corporation, pending at the date of the decree, on the ground that the petition for dissolution contained a false averment that the corporation had no debts, when the application was not made for twenty months after the decree, the applicant gives no *prima facie* evidence of the liability of the company, and does not show when he obtained knowledge of the decree.[48]

698. Dissolution of Manufacturing, Mining, Mechanical, etc., Corporations.

. . . . The Court of Common Pleas of the proper county shall have the same power to dissolve such corporation, upon petitions filed under the corporate seal, which it now has with regard to other corporations. . . . .[49]

699. To Enable Mining, Manufacturing and Trading Companies to Wind Up Their Affairs.

All corporations for mining, manufacturing or trading purposes, whether created by general or special acts of assembly, whose charters may have expired, or may hereafter expire, or

(46) Harmony Bdg. Assn. *v.* Berger, 17 Phila., 314 (1884); Bldg. Assn. *v.* Long, 1 W. N. C., 391 (1875). See Sec. 699.

(47) Helping Hand B. & L. Assn. *v.* Marsh, 18 Pa. Super. Ct., 319 (1902).

(48) New Castle Wire Nail Co.'s Case, 18 Pa. Super. Ct., 257 (1902).

(49) Sec. 39, Clause 10, Act April 29, 1874, P. L., 103.

which may have been dissolved or may hereafter be dissolved by any judicial decree, may bring suits, and maintain and defend suits already brought, for the protection and possession of their property, and the collection of debts and obligations owing to, or by, them, and sell, convey and dispose of their property, and make title therefor, as fully and effectually as if their charters had not expired, or such decree had not been made; and the officers last elected, or the survivors of them, shall be officers to represent said corporations for such purposes, and if no officers survive, the stockholders may elect officers, under their by-laws: *Provided,* That this act shall be construed only so as to enable said corporations to realize and divide their assets, and wind up their affairs, and not to transact new business.[50]

A corporation chartered to erect a dam and to cut ice is a trading company within the meaning of this act. Said act applies to all trading companies whose business has ceased or terminated for any cause whatever and not merely to corporations whose charters have expired by express limitations. It applies to companies whose property and franchises have been sold under execution.[51]

700. Dissolution of Insolvent Insurance Companies.

Whenever the Insurance Commissioner shall have reason to believe that any insurance company of this State is insolvent or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any non-compliance with the provisions of this act, he shall communicate the fact to the Attorney General, whose duty it shall then become to apply to the Supreme Court or the District Court, or any Court of Common Pleas in this Commonwealth, or in vacation to any of the judges thereof, for any order requiring said company to show cause why their business should not be closed; and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties, or appoint some suitable person as examiner to perform such duty and report upon the facts to said court or judge; if it appears to the satisfaction of said

(50) Act of May 23, 1907, P. L., 204, amending Act May 21, 1881, P. L., 30. This act is practically a re-enactment of the Act of May 8, 1874, P. L., 278.

(51) Pocono Spring Water Co. *v.* American Ice Co., 214 Pa., 640 (1906).

court or judge that such company is insolvent or that the interests of the public so require, the said court or judge shall decree a dissolution of such corporation and a distribution of its effects; but in case it shall appear to said court or judge that said corporation is able to comply with the provisions of this act, and that it is not insolvent, a decree shall be entered annulling the act of the Commissioner in the premises, and authorizing such company to resume business.[52]

The Court of Common Pleas of Dauphin county has jurisdiction to dissolve insurance companies, under the foregoing act, in any county of the Commonwealth.[53]

(52) Sec. 5, Clause 8, Act April 4, 1873, P. L., 23.

(53) Mahoney Mut. Assess. Life Assn. *v.* Com., 14 W. N. C., 370 (1883).

CHAPTER XXX.

FOREIGN CORPORATIONS.

701. Foreign Corporations Doing Business in Pennsylvania Required to Have Local Office and Resident Agent, and to Register in the Office of the Secretary of the Commonwealth.

702. Status of Foreign Corporations Doing Business in Pennsylvania Which Have not Complied with the Requirements of the Act of April 22, 1874.

703. What Constitutes the Doing of Business in Pennsylvania Within the Meaning of the Act of April 22, 1874.

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712. Foreign Corporations Forbidden to Hold Real Estate.

713. Foreign Manufacturing Corporations of Various Kinds May Hold Real Estate.

714. Foreign Iron, Steel, Glass, Quarrying, Mineral Spring Water, Ice Manufacturing and Chemical Companies and Corporations Founded for the Manufacture of Food Stuffs and Cement and Cement Products May Hold Real Estate.

715. Foreign Publishing and Bookselling Corporations, the Profits of Which are Applied to Religious and Charitable Purposes, May Hold Real Estate.

716. Foreign Corporations Engaged in the Transportation of Passengers and Freight by Water Between this and Other States May Hold Real Estate.

717. Foreign Ferry and Bridge Companies May Hold Real Estate.

718. Foreign Insurance Companies May Hold Real Estate.

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701. Foreign Corporations Doing Business in Pennsylvania Required to Have Local Office and Resident Agent, and to Register in the Office of the Secretary of the Commonwealth.

No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served.[1]

(1) Sec. 5, Article 16, Constitution of Pennsylvania.

From and after the passage of this act, no foreign corporation shall do any business in this Commonwealth, until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.[2]

It shall not be lawful for any such corporation to do any business in this Commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices.[3]

The certificate need not be hung on the wall of the office for public inspection. It may be kept in a safe in the office.[4]

Any person or persons, agent, officer or employe of any such foreign corporation, who shall transact any business within this Commonwealth, for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same.[5]

(2) Sec. 1, Act April 22, 1874, P. L., 108.

(3) Sec. 2, Act April 22, 1874, P. L., 108. The certificate provided for in this section may be signed by the Deputy Secretary of the Commonwealth. Power of Deputy Secretary of the Commonwealth, 6 Dau. Co. Rep., 216 (1903).

(4) McManus Contracting Co. *v.* McFadden, 33 Pa. Super. Ct., 355 (1907).

(5) Sec. 3, Act April 22, 1874, P. L., 108. "A citizen of this State who has a business transaction with another, as agent of a foreign corporation, may rely upon the representation of the agent as to his authority, without releasing him from his common law liability as principal, if it turns out that his action was unauthorized. In other words, his failure to make search in the office of the Secretary of the Commonwealth for the statement which the corporation ought to file there, will not inure to the benefit of the person who falsely pretended that he was its duly authorized agent." Lasher *v.* Stimson, 145 Pa., 30 (1891). See next section.

702. Status of Foreign Corporations Doing Business in Pennsylvania Which Have Not Complied With the Requirements of the Act of April 22, 1874.

Compliance with the requirements of the Act of April 22, 1874, P. L., 108, is a condition precedent to the lawful transaction of business in Pennsylvania by a foreign corporation, and without such compliance its engaging in business therein is utterly unlawful and can give rise to no rights the company can enforce in the courts of the State. Such corporations having no absolute right of recognition in the State, depend for such recognition and for the enforcement of their contracts upon the assent of the Commonwealth, according to such terms as it may prescribe. Hence, whenever a foreign corporation seeks to enforce in the courts of Pennsylvania demands accruing to it from the transaction of business within the State, it is bound to show, as a part of its case, that it was entitled to do business therein as a corporation, that is, that it has complied with the provisions of the Act of April 22, 1874.[6]

Where, however, the failure to comply with said provisions is not averred or proved, and the case is permitted without objection based on such omission, to go to the jury, the verdict of the latter will cure the defect.[7]

A foreign corporation registering after the work on a contract to construct a street railway within the State has been completed, cannot maintain an action for labor and materials furnished in the execution of the contract.[8]

Foreign corporations not registering in the office of the Secretary of the Commonwealth, under the provisions of the Act of April 22, 1874, have no existence in this State. Consequently

(6) Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa., 526-29 (1898); citing Thorne *v.* Ins. Co., 80 Pa., 15 Mut. Ben. Life Ins. Co. *v.* Bales, 92 Pa., 352; Travellers' Ins. Co. *v.* Heath, 95 Pa., 333; Lasher *v.* Stimson, 145 Pa., 30; Holt *v.* Green, 73 Pa., 198; Johnson *v.* Hulings, 103 Pa., 498; Office Specialty Mfg. Co., 1 D. R., 576; Citizens' Trust & Surety Co. *v.* McCann & Frazer Co., 6 D. R., 25 (1896); List *v.* Com., 118 Pa., 322; Niagara Homestead Co. *v.* Vernier, 28 Pa. C. C., 427 (1903); Columbia Mills Co. *v.* Lincoln Savings & Trust Co., 15 D. R., 987 (1906).

(7) Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa., 526-31 (1898), and cases cited. See Amer. Steel and Wire Co., of N. J. *v.* Raleigh Coal & Coke Co., 10 D. R., 285 (1901).

(8) Delaware River Q. & C. Co. *v.* Bethlehem & Nazareth Pass. Ry. Co., 204 Pa., 22 (1902).

they can appoint no agent here, and one acting as their agent is personally liable for the contracts he makes in the name of such company. The penalty imposed by said Act of 1874 is not exclusive of, but in addition to, the common law responsibility of the person holding himself out as such agent.[9]

But directors and stockholders of foreign corporations doing business in Pennsylvania without registering as required by the Act of April 22, 1874, are not liable as partners for debts contracted within the State in the corporate name.[10]

Contracts made by foreign corporations which have not registered, as provided by the act, are void, and no action will lie upon an award thereon by the arbiter nominated in the instrument for work done under the contract after the company has registered.[11]

Such a foreign corporation may be restrained from establishing and operating an electric light plant within the Commonwealth.[12]

It is not necessary, however, for the Commonwealth to prove that a foreign consignor company, prosecuting its resident agent for embezzlement, under Sec. 125 of the Act of March 31, 1860, P. L., 411, has registered in accordance with the provisions of the Act of April 22, 1874.[13]

A foreign corporation owning personal property in Pennsylvania, may maintain an action in that State to recover the same, though it be not registered in compliance with the Act of April 22, 1874, where the person retaining the property had no contract relations with the corporation.[14]

703. What Constitutes the Doing of Business in Pennsylvania Within the Meaning of the Act of April 22, 1874.

A foreign corporation having none of its capital invested in

(9) Lasher *v.* Stimson, 145 Pa., 30 (1891).

(10) Bond *v.* Stoughton, 26 Pa. Super. Ct., 483 (1904); Stephenson *v.* Dodson, 15 D. R., 771 (1906).

(11) Pittsburgh Construction Co. *v.* West Side Belt R. R. Co., U. S. Cir. Ct. Ap., 16 D. R., 670 (1907); Office Specialty Mfg. Co., Op. Sec. Com., 12 Pa. C. C., 44 (1892); *Contra.* Amer. Product Co. *v.* Phila., et al., 15 D. R., 587 (1906); 33 Pa. C. C., 55. See Phila. Bill Posting Co. *v.* Wagefarth, 33 Pa. C. C., 126 (1906).

(12) Wilkesbarre Light Co. *v.* Wilkesbarre Light, Heat & Motor Co., 4 Kulp., 47 (1886).

(13) Com. *v.* Shober, 3 Pa. Super. Ct., 554 (1897).

(14) Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct., 527 (1904).

Pennsylvania, may execute orders for the delivery of goods, given to salesmen in Pennsylvania, without being required to comply with the provisions of the Act of April 22, 1874. The execution of such orders is not a doing of business within this State within the meaning of the law.[15]

A foreign corporation chartered for the purpose of constructing railroads and the mining and transporting of coal and other minerals may maintain a scire facias sur mortgage in Pennsylvania, although the land covered by the mortgage was coal land, and the money was a loan to the mortgagor for the purpose of developing the coal and selling it to the mortgagee, such foreign corporation not being engaged in doing business within the State.[16]

But where a foreign corporation appoints a local agent within the State, and consigns goods to him in carload lots for sale on commission, it is doing business within the meaning of the act; and where there was a failure, in such case, to comply with its provisions, a non-suit was properly entered in a suit brought by the company to enforce its civil contracts,[17] but a foreign corporation appointing a storekeeper within the State its local agent and agreeing to sell to no one else in that community is not doing business within the State within the meaning of the act.[18]

An unregistered foreign corporation cannot recover a subscription toward a fund for building a butter factory erected by it within the Commonwealth.[19]

The making of a single contract in Pennsylvania to be executed outside of the State by a foreign corporation does not amount to doing business in the State, under the act,[20] nor does a settlement

(15) Mearshon & Co. *v.* Pottsville Lumber Co., Lim., 187 Pa., 12 (1898); Kilgore *v.* Smith, 122 Pa., 48; Wolff Dryer Co. *v.* Bigler & Co., 192 Pa., 466 (1899); Hovey's Estate, 198 Pa., 385 (1901); Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. C. C., 533 (1896); N. J. Steel Tube Co. *v.* Riehl, 9 Pa. Super. Ct., 220, (1899); Darst Co. *v.* Cohen, 9 Dau. Co. Rep., 251 (1903); *Contra,* Gould's Mfg. Co., 3 D. R., 606 (1894); Wile & Brickner Co. *v.* Onsel, 1 D. R., 187 (1891).

(16) New York & Scranton Construction Co. *v.* Winton, 208 Pa., 467 (1904).

(17) Milsom Rendering & Fertilizer Co. *v.* Kelly, 10 Pa. Super. Ct., 565 (1899). See Nonantum Worsted Co., Op. Atty. Gen., 3 D. R., 428 (1894); 15 Pa. C. C., 125.

(18) Cosmopolitan Fashion Co. *v.* Brobst, 18 Lanc. L. R., 231 (1901); 15 York, 8.

(19) Chicago Bldg. & Mfg. Co. *v.* Myton, 24 Pa. Super. Ct., 16 (1903).

(20) McConkey *v.* Peach Bottom Slate Co., 3 D. R., 594 (1894).

of accounts by a foreign corporation, for goods sold at its place of business in New Jersey, when such settlements are made in Pennsylvania.[21] And the mere holding of a meeting of stockholders and directors in Pennsylvania is not such a transaction of business in that State as to prevent such corporation from suing in Pennsylvania, because the company has not registered under the provisions of the Act of May 22, 1874.[22]

A foreign insurance company does not do business in this State, within the meaning of said act, where no person in the State is authorized to accept applications for insurance, receive or collect money thereon or receive or collect money on any other account for the said company, but all applications are sent direct to the foreign office from which all policies are issued.[23]

A foreign corporation organized to act as the general agent of its members in the sale of canned goods produced by them, and having and employing no capital in this State, is not subject to the provisions of the Act of April 22, 1874. In an action of replevin for goods purchased in good faith from such corporation by the plaintiff, he is not affected by the provisions of the said act, and, if he were, the defendant, being a member of the corporation, would be estopped from setting up the statute as a defense. Nor may the defendant in such action, holding the goods subject to the control and order of the corporation, set off against the plaintiff's recovery, a large indebtedness of the corporation to him for the goods in dispute.[24]

A foreign building and loan association having its office in the State of its domicile, where, under its articles of association and by-laws, its business must be conducted, and at which office all contracts must be passed upon and all payments made to it, does not do business in Pennsylvania within the meaning of the Act of April 22, 1874, in making a loan to a citizen of Pennsylvania, through an agent in that State, secured by a mortgage on Pennsylvania real estate.[25]

(21) N. J. Steel Tube Co. *v.* Riehl, 9 Pa. Super. Ct., 220 (1899).

(22) Wildwood Pavilion Co. *v.* Hamilton, 15 Pa. Super. Ct., 389 (1900); reversing judgment of lower court, 43 W. N. C., 303; Stephenson *v.* Dodson, 15 D. R., 771 (1906).

(23) Fulton et al. *v.* Commercial Travellers' Mut. Accident Association, 172 Pa., 117 (1895).

(24) Kilgore et al. *v.* Smith et al., 122 Pa., 48 (1888); 22 W. N. C., 570.

(25) People's B. & L. Assn. *v.* Berlin, 201 Pa., 1 (1901), over-ruling Same *v.* Same, 15 Pa. Super. Ct., 393 (1900); People's B. & L. Sav. Assn.

A New Jersey corporation not registered, as required by the Act of April 22, 1874, may maintain an action in Pennsylvania upon a contract of subscription to its stock, made at a meeting held in Pennsylvania.[26]

A foreign corporation, not registered under said act, is not precluded thereby from recovering moneys due by a decedent as agent and factor upon his contract as guarantor, and for goods sold by him, this not being such a carrying on of business as is contemplated by the act.[27]

The making of an assignment in Pennsylvania by a foreign corporation is not a doing of business in the State within the meaning of the act.[28]

Where evidence is heard as to whether certain transactions between parties was a doing of business by a foreign corporation, within the State, within the meaning of the Act of April 22, 1874, it is a question for the jury, under proper instructions from the court.[29]

An affidavit of defense in an action by a foreign corporation to recover assessments on stock is insufficient which avers that the plaintiff maintained an office in Philadelphia where its business was carried on and the assessment made, that all business relative to the issue of stock was carried on in Pennsylvania, and that it had not complied with the provisions of the Act of April 22, 1874, but neglects to set out when the business was transacted and the character thereof.[30]

704. The Burden of Proof is on the Foreign Corporation to Show Compliance With the Provisions of the Act of April 22, 1874.

The burden of proof is on the foreign corporation to show

v. Neal, 201 Pa., 9 (1901); over-ruling Same *v.* Same, 15 Pa. Super. Ct., 400 (1900).

(26) Wildwood Pavilion Co. *v.* Hamilton, 15 Pa. Super. Ct., 389 (1900); reversing 43 W. N. C., 303, and 22 Pa. C. C., 69 (1898). See Galena Mining & S. Co. *v.* Frazier, 20 Pa. Super. Ct., 394 (1902).

(27) Hovey's Estate, 198 Pa., 385; 9 D. R., 183 (1900).

(28) Zucker *v.* Froment, 5 D. R., 579 (1896).

(29) Liebig Mfg. Co. *v.* Hill, 7 Pa. Super. Ct., 15 (1898); 41 W. N. C., 561. The question at issue in this case was, whether goods had been shipped direct to the purchaser in Pennsylvania, or to a commission agent, or, in his name, to the purchaser.

(30) Galena Mining & Smelting Co. *v.* Frazier, 20 Pa. Super. Ct., 394 (1902).

compliance with the act. Where a foreign corporation contracts to deliver and store ice in Pennsylvania, without regard to its source of supply or place of manufacture, it is doing business within the State within the meaning of the act.[31]

705. Foreign Corporations Must Register All Their Agencies in the State.

A foreign corporation must register all its agencies or places of business in Pennsylvania, and the fact that one agency has been registered will not permit the company to recover in a suit for the price of goods sold within the State by another agency which has not been registered.[32]

And it seems that a foreign corporation has no right to do business in a county until it has registered its office and agent in such county under the Act of 1874, though it may have agents duly registered in other counties.[33]

706. Powers of Duly Registered Foreign Corporations.

A foreign corporation will not be permitted to exercise in a State powers which the laws of such State deny to domestic corporations.[34]

Hence, a foreign corporation authorized by its charter to carry on the business of dentistry will not be permitted to carry on such business in a State where, as in Pennsylvania, the laws regulating the practice of dentistry do not contemplate such practice by a corporation.[35]

707. Foreign Corporations Becoming Plaintiffs in Suits May be Ruled to Enter Security for Costs.

A foreign corporation, though having a place of business in Pennsylvania, and registered under the Act of April 22, 1874, may, when it becomes a plaintiff in a suit, be ruled to enter security for costs.[36]

(31) West Jersey Ice Mfg. Co. *v.* Armour & Co., 12 Pa. Super. Ct., 443 (1899).

(32) National Wall Paper Company's Appeal, 15 Pa. Super. Ct., 407 (1900).

(33) Phœnix Silk Mfg. Co. *v.* Reilly, 187 Pa., 526-7 (1898).

(34) Clark & Marshall's Private Corpns., 841.

(35) Com. ex rel. *v.* Alba Dentists Co., 30 Pa. C. C., 65 (1904).

(36) J. L. Mott Iron Works *v.* S. Faith & Co., 23 Pa. C. C., 665 (1900).

And a judgment for costs in a criminal prosecution in which the agent of a foreign corporation was the prosecutor may be entered against such corporation.[37]

708. Affidavits of Defense in Suits Instituted by Foreign Corporations Which Have Not Complied With the Act of April 22, 1874.

An affidavit of defense, averring as the sole ground thereof that the plaintiff is a foreign corporation, which has not complied with the requirements of the Act of April 22, 1874, but which fails to aver that the plaintiff corporation is doing business within the State, is insufficient to prevent summary judgment,[38] and an averment in such an affidavit that the foreign corporation in question "is attempting to carry on business" within the State, though it has not filed a statement as required by the said act, is insufficient to prevent judgment.[39]

709. Registered Agents Continue Such Until Their Appointments are Cancelled or Revoked.

The same person may be the authorized registered agent of a foreign corporation as provided by the Act of April 22, 1874, P. L., 108, and also the commercial agent of the same corporation; but if he resigns his position as commercial agent without taking any steps to have his appointment as registered agent canceled or annulled, he continues as registered agent, and the corporation cannot be charged after such registration with doing business in this State without a registered authorized agent, so long as the public record of his appointment remains unchanged.

Where a person becomes both the authorized registered agent and the commercial agent of a foreign corporation, and subsequently resigns as commercial agent, but permits the record of his authorized agency to remain without amendment and unaltered, and thereafter enters into a contract with the corporation, he cannot, in order to invalidate the contract, aver that the cor-

(37) Com. *v.* Fell, 31 Pa. Super. Ct., 574 (1906).
(38) Campbell Printing Press & Mfg. Co. *v.* Hering, 139 Pa., 473 (1891).
(39) Sigua Iron Co. *v.* Vandervort, 164 Pa., 572 (1894).

poration was doing business in the State without an authorized agent.[40]

A foreign corporation making a contract in Pennsylvania, at a place designated upon its letter-heads as its Philadelphia office, and holding meetings of its board of directors at that office, is liable to an action upon such contract in Pennsylvania, even though its Pennsylvania office is abandoned prior to the beginning of the suit.[41]

710. Foreign Corporations Complying With the Act May Remove Suits to the Federal Courts.

A foreign corporation does not waive the right given it by the Act of Congress of August 13, 1888, to remove to the Federal courts suits brought against it, by appointing an agent in Pennsylvania to receive service of summons or other process.[42]

711. Contracts and Mortgages Assigned by Foreign Corporations Which Have Not Complied With the Act of April 22, 1874, May be Enforced.

Whenever a foreign corporation, not having complied with the provisions of the act to which this is a supplement, shall have assigned bona fidely any mortgage or contract to any citizen of the State of Pennsylvania or to any other corporation, any such person or corporation, being the assignee or successor of such delinquent foreign corporation in the holding of any mortgage, obligation or contract so assigned, may enforce the same in the courts of this State, notwithstanding such delinquent assignor foreign corporation has heretofore failed to file the statement and obtain the certificate required by the act to which this is a supplement: *Provided,* That the provisions of this act shall not apply to any assignment of any contract or mortgage unless such assignment shall have been made ten or more years prior to the passage of this act.[43]

(40) De la Vergne Refrigerating Machine Co. *v.* Kolischer, 214 Pa., 400 (1906).

(41) Causey *v.* Cedartown Land Impt. Company, 1 D. R., 557 (1892).

(42) Fox *v.* Amer. Casualty Ins. & Security Co., 12 Pa. C. C., 207 (1892).

(43) Act May 11, 1901, P. L., 172, a supplement to Act April 22, 1874.

712. Foreign Corporations Forbidden to Hold Real Estate.

No corporation other than such as shall have been incorporated under the laws of this State, nor shall any foreign government, potentate or power, hereafter acquire and hold any real estate within this Commonwealth directly, in the corporate name, or by or through any trustee or other device whatsoever, unless specially authorized to hold such property by the laws of this Commonwealth: *Provided,* That the residence without the limits of this State of a portion of the members of any religious, literary, charitable or beneficial society or association otherwise qualified to hold real or personal estate within this State, shall not incapacitate such society or association from taking and holding such property, not exceeding the value limited by law.[44]

All property hereafter acquired and held by persons, corporations or associations, forbidden by this act to hold the same, or held contrary to the intent of this act, and all such hereafter acquired, and held beyond the limit prescribed as aforesaid by this act, shall escheat to this Commonwealth, and upon the same being adjudged to have escheated, under proceedings in court by quo warranto, in all respects as is provided by law in the case of the usurpation of any corporate franchise, the same shall be taken in possession and disposed of, and with the like compensation to the person or persons informing and procuring the inquisition, as in cases of property escheated for defect of heirs: *Provided,* That no property now held, or hereafter lawfully acquired, shall afterwards become defeasible in title by reason of any subsequent rise in the value thereof; but such rise, after it shall occur, shall be taken into view to preclude a further acquisition, and holding beyond the limit aforesaid: *And provided,* That the Legislature may relieve, upon such terms as may be deemed just and for the public good, from any forfeiture as aforesaid, upon the payment to the party informing or prosecuting, his actual expenses, and such further reasonable compensation as the Legislature may prescribe.[45]

A foreign corporation may sue in the courts of this State to enforce the payment of a loan secured by mortgage on real estate in Pennsylvania. It seems, however, that if a foreign corpora-

(44) Sect. 5, Act April 26, 1855, P. L., 328. See Act of April 6, 1833, P. L., 167. See Sec. 430.

(45) Sec. 9, Act April 26, 1855, P. L., 328.

tion should resort to the remedy of ejectment to recover possession of the land, or become the purchaser at a sheriff's sale, the Commonwealth might forfeit the lands under the statute of mortmain, but the grantor or mortgagor could not set that up as a defense against his own conveyance or mortgage.[46]

The mortmain acts do not prevent a foreign corporation from holding real estate in Pennsylvania through the ownership of a controlling interest in the stock of a domestic corporation.[47]

A corporation of another State owning mining leases in Pennsylvania, sold coal to the defendants in that State, through an agent here known to the defendants to be such agent. Held, in a suit by the corporation for the price of the coal that the defendants could not raise the question of the plaintiff's right to hold such leases. Such inquiry can be made only by the Commonwealth.[48]

A foreign corporation may lawfully take a lease of an office in Pennsylvania, within which to transact its business,[49] and such corporation may take land in said State by gift or devise, to be expended for charitable uses.[50]

713. Foreign Manufacturing Corporations of Various Kinds May Hold Real Estate.

It shall be may be lawful for any company incorporated under the laws of any other State of the United States for the manufacture of any form of iron, steel, glass, lumber or wood, or for the conversion, dyeing and cleansing of cotton and other fabrics, or for the manufacture of cotton or velvet or other fabrics, of for the manufacture of pyroligneous acids, acetate of lime and charcoal by the process of destructive distillation, or the preparation of cattle hair for use, or for the manufacture of carbon dioxide and magnesia and the products thereof and compositions,

(46) Leasure *v.* Union Mut. Life Ins. Co., 91 Pa., 491 (1879); American Slate Co. *v.* Phillipsburg B. & L. Savings Bank, 8 W. N. C., 430 (1879). See Sec. 382.

(47) Com. *v.* N. Y., L. E. & Western R. Co., 132 Pa., 591 (1887); 139 Pa., 457 (1891); White *v.* Ryan, 15 Pa. C. C., 170 (1894); Hartwell *v.* Buffalo, Rochester & Pitts. Ry. Co., Op. Atty. Gen., 19 Pa. C. C., 231 (1897).

(48) Grant *v.* Henry Clay Coal Co., 80 Pa., 208 (1876).

(49) Balto. & Phila. Steamboat Co. *v.* McCutcheon & Collins, 13 Pa., 13 (1850).

(50) Thompson *v.* Swoope, 24 Pa., 474 (1855).

articles and apparatus from and in connection therewith, or for the manufacture of extracts out of wood, bark, leaves and roots, or any other extract for tanning, cleansing, dyeing or other purposes, or for the manufacture or printing of wall paper, lithographs or prints, and mining and manufacture of any clay into brick tile and various other articles and products produced from clay, and from clay and other substances mixed therewith, to erect and maintain buildings for such manufacturing purposes, and for offices and salesrooms, or either, within this Commonwealth, and to take, have and hold real estate, not exceeding one hundred acres, necessary and proper for such manufacturing purposes, and for offices, dwellings and salesroom, or either, and to mortgage, bond, lease or convey the same or any part thereof: *Provided,* That nothing herein contained shall be deemed to prevent or relieve any real estate taken and held by any such foreign corporation under the provisions of this statute from being taxed in like manner with other real estate within this Commonwealth: *And provided further,* That no such foreign corporation shall be entitled to employ any greater amount of capital in such business in this State than the same kind of corporations organized under the laws of this State are entitled to employ: *And provided further,* That every such foreign corporation doing business as aforesaid in this Commonwealth shall be liable to taxation to an amount not exceeding that imposed on corporations organized for similar purposes under the laws of this State, and every such foreign corporation taking the benefit of this act shall make the same returns to the Auditor General that are required by law to be made by corporations of this State under similar circumstances.[51]

The title to any real estate in this Commonwealth now held by, or in trust for, any such foreign corporations for the purpose aforesaid is hereby confirmed to the same effect as if the said real estate has been purchased, held or owned under the provisions of this act.[52]

(51) Sec. 1, Act of June 8, 1893, P. L., 389. See Note 52.

(52) Sec. 2, Act of June 8, 1893, P. L., 389, which was an amendment to the Act of April 13, 1891, P. L., 39, which amended the Act of April 28, 1887, P. L., 77, which was a supplement to the Act of June 25, 1885, P. L., 179, which was a supplement to the Act of June 9, 1881, P. L., 89.

714. Foreign Iron, Steel, Glass, Quarrying, Mineral Spring Water, Ice Manufacturing and Chemical Companies and Corporations Formed for the Manufacture of Food Stuffs, Cement and Cement Products May Hold Real Estate.

It shall and may be lawful for any company incorporated under the laws of any other State, for the manufacture of any form of iron, steel or glass, or for the quarrying of slate, granite, cement rock, stone or rocks of any kind, or for dressing, polishing or manufacturing the same, or any of them, or for any mineral springs company incorporated for the purpose of bottling and selling natural mineral springs water, or for any company incorporated for the purpose of manufacturing, supplying and sale of ice, or for the manufacture and sale of chemicals, or for the manufacture and sale of foodstuffs and eatables, cement and cement products, and the quarrying of cement rock, to erect and maintain buildings and manufacturing establishments within this Commonwealth, and to take, have and hold real estate to an amount necessary and proper for corporate purposes: *Provided,* That nothing herein contained shall be deemed to prevent or relieve real estate, taken and held by such company under the provisions of this statute, from being taxed in like manner with other real estate within this Commonwealth: *And provided further,* That no foreign corporation shall be entitled to employ any greater amount of capital in any such business in this State than the same kind of corporations organized under the laws of this State are entitled to employ: *And provided further,* That every such foreign corporation, doing business as aforesaid in this Commonwealth, shall be liable to taxation to an amount not exceeding that imposed on corporations organized for similar purposes under the laws of this State, and every such foreign corporation taking the benefit of this act shall make the same returns to the Auditor General that are now required by law of the corporations of this State.[53]

715. Foreign Publishing and Bookselling Corporations, the Profits of Which are Applied to Religious and Charitable Purposes, May Hold Real Estate.

Hereafter it shall be lawful for all corporations chartered under

(53) Act of May 28, 1907, P. L., 266, amending Act of April 19, 1901, P. L., 86, which amended Sec. 1, Act June 16, 1893, P. L., 466, which was an amendment to the Act of June 9, 1881, P. L., 89.

the laws of any other State, and engaged in this State in the publication and sale of books, tracts, newspapers, periodicals and such other business as is commonly connected with publishing and book selling, the net profits of which are by its charter or governing body required to be applied to religious and charitable uses, and that have a duly authorized agent or agents as required by existing laws for the purpose of carrying on the said business, to take, hold and enjoy in any part of this Commonwealth, either in its corporate name or by trustee or trustees, agent or agents, real estate and premises in which such corporation shall carry on their said business, and to mortgage and convey the same, or any part thereof, and to lease any part of the buildings erected thereon not requisite for the transaction of their business: *Provided however,* That the clear yearly value or income from said real estate shall not exceed twenty thousand dollars.

The title to any real estate in this Commonwealth now held by or in trust for any such corporation for the purposes aforesaid is hereby confirmed to the same effect as if the said real estate had been purchased, held or owned under the provisions of this act.[54]

716. Foreign Corporations Engaged in the Transportation of Passengers and Freight by Water Between this and Other States May Hold Real Estate.

It shall be lawful for any company incorporated under the laws of any other State of the United States for the transportation of passengers and freight by steamboats or other vessels, upon or over any river or waters between this State and any other State, to lease, erect or purchase offices, piers, warehouses and other buildings necessary for its business, and to hold in this State, either in its corporate name, or by a trustee or trustees, real estate necessary for the transaction of its business; to lease erect or purchase and maintain any riparian rights for the laying, landing or dockage of its steamboats or other vessels, and to mortgage and convey said real estate or any part thereof: *Provided,* That nothing herein contained shall be deemed to prevent or relieve any real estate held by any such corporation from being taxed in like manner as other real estate in this Commonwealth. And the title of any real estate in this Commonwealth now held by or in trust for any such corporation, for the purposes aforesaid,

(54) Act of June 24, 1895, P. L., 238.

is hereby confirmed with the same effect as if said real estate had been purchased, held and owned under the provisions of this act: *And provided further,* That the provisions of this act shall apply only to companies that have been duly registered in the proper offices of this Commonwealth, as required by law, for the purposes of taxation.[55]

717. Foreign Ferry and Bridge Companies May Hold Real Estate.

It shall and may be lawful for any company incorporated under the laws of any other State for the establishment, maintenance and continuance of a ferry, or for the maintenance and continuance of a bridge, between this State and any other State upon or over any river flowing between said States, to erect and maintain piers, offices, warehouses and all other buildings and structures necessary for the maintenance of such ferry or bridge and conducting the freight and passenger business to be moved thereby, and to take, have and hold, in this State, real estate necessary and proper for the purpose of such ferry or bridge, and for such piers, offices, warehouses, buildings and structures, or either and to mortgage, lease or convey the same, or any part thereof: *Provided,* That nothing herein contained shall be deemed to prevent or relieve any real estate, taken by or held by any such corporation, under the provisions of this act, from being taxed in like manner with other real estate in this Commonwealth, and the title to any real estate in this Commonwealth now held by or in trust for any such corporation for the purposes aforesaid is hereby confirmed, with the same effect as if the said real estate had been purchased, held or owned under the provisions of this act.[56]

718. Foreign Insurance Companies May Hold Real Estate.

Hereafter it shall be lawful for all corporations and joint-stock companies or associations, chartered, created or existing under the laws of any other State, or of any foreign country, for the purpose of carrying on the business of insurance, to take, hold and enjoy in any part of this Commonwealth, either in its corporate or associate name, or by a trustee or trustees, real estate and premises in which such corporation, joint stock companies or

(55) Act of April 17, 1889, P. L., 35.
(56) Act of June 6, 1887, P. L., 352.

associations shall carry on their said business, and to mortgage or convey the same, or any part thereof, and to lease any part of the buildings erected thereon, not requisite for the transaction of their said business.[57]

The title to any real estate in this Commonwealth, now held by, or in trust for, any such corporation or joint stock company or association, for the purposes aforesaid, is hereby confirmed, to the same effect as if the said real estate had been purchased, held or owned under the provisions of this act.[58]

719. Foreign Mining Corporations.

Sec. 2 of the Act of July 22, 1863, P. L., 1864, 1098, provided: That any corporation, association or company, not incorporated under the laws of this State, may acquire, hold and convey not exceeding three hundred acres of land in this Commonwealth for mining purposes. This provision was repealed by Act of March 23, 1865, P. L., 32, with the proviso: "That nothing contained in this act shall impair any rights or privileges heretofore acquired by said foreign corporations under existing laws."[59]

720. Foreign Corporations May Purchase Certain Real Estate at Judicial Sales.

Any corporation incorporated and existing under the laws of any other State of the United States and doing business in this State, and having therein one or more known places of business and an authorized agent or agents, upon whom process may be served, is hereby authorized and empowered to purchase, in its corporate name, at any sheriff's or other judicial sale, any real estate upon which such corporation may have or hold any mortgage, judgment or lien, and to hold, lease or sell and convey the same at pleasure to any person or persons, corporation or corporations, whatsoever: *Provided, however,* That any real estate, so purchased as aforesaid, shall be sold and conveyed within ten years from the date of such purchase.[60]

All the rights and privileges and duties now by law accorded

(57) Sec. 1, Act June 1, 1881, P. L., 38. For other provisions relative to Foreign Insurance Companies, see chapter on Insurance Companies.

(58) Sec. 2, Act June 1, 1881, P. L., 38.

(59) See Com. *v.* Central Petroleum Co., 1 Pears., 373 (1867).

(60) Sec. 1, Act May 23, 1887, P. L., 176.

to and imposed upon lien creditors, purchasing at judicial sales, be and the same are hereby extended to said corporations, so purchasing as aforesaid.[61]

The title to any such real estate in this Commonwealth now held by or in trust for any such foreign corporation, and acquired at any judicial sale, is hereby confirmed to the same effect as if the said real estate had been purchased, held or owned under the provisions of this act.[62]

721. Extension of Time During Which Foreign Corporations May Hold Real Estate Purchased at Judicial Sales.

The time during which any corporation, incorporated and existing under the laws of any other State of the United States and doing business in this State, and having therein one or more known places of business, and an authorized agent or agents upon whom process may be served, is now authorized by law to hold real estate heretofore purchased according to law at any sheriff's or other judicial sale, and upon which such corporation may have held any mortgage, judgment or lien, be and the same hereby is extended for a further period of five years.[63]

722. Grantees of Real Estate of Foreign Corporations Before Inquisition May Hold and Convey the Same Indefeasibly.

Where any conveyances of real estate in this Commonwealth have been made by any alien, or any foreign corporation or corporations of another or of this State, or by the officers of any such corporation after dissolution or expiration of charter since the ninth day of June, Anno Domini one thousand eight hundred and ninety-one, to any citizen of the United States or to any corporation chartered under the laws of this Commonwealth and authorized to hold real estate, before any inquisition shall have been taken against the real estate so held to escheat the same, such citizens or corporations, grantee as aforesaid, shall hold and may convey such title and estate indefeasibly, as to any rights of

(61) Sec. 2, Act May 23, 1887, P. L., 176.

(62) Sec. 3, Act May 23, 1887, P. L., 176, as amended by Act of June 9, 1891, P. L., 252.

(63) Act June 8, 1897, P. L., 136. This act, taken in connection with the preceding Act of May 23, 1887, permits foreign corporations to hold real estate acquired under the circumstances mentioned in the act, for the period of fifteen years.

escheat in this Commonwealth, by reason of such real estate having been held by an alien or corporation not authorized to hold the same by the laws of this Commonwealth.[64]

Where any conveyances of real estate in the Commonwealth have been or shall be made by an alien or any foreign corporation or corporations of another or of this State to any citizen of the United States, or to any corporation chartered under the laws of this Commonwealth and authorized to hold real estate, before any inquisition shall have been taken against the real estate so held to escheat the same, such citizens or corporation, grantee as aforesaid, shall hold and may convey such title and estate indefeasibly as to any right of escheat in this Commonwealth by reason of such real estate having been held by an alien or corporation not authorized to hold the same by laws of this Commonwealth.[65]

Where any conveyances of real estate in this Commonwealth have been made by any foreign corporation or corporations not having the right to own and hold the same, to any citizen of the United States, or to any corporation chartered under the laws of this Commonwealth and authorized to hold real estate, such citizen or corporation, grantee as aforesaid, shall hold and may convey such title and estate, indefeasably, as to any right of escheat in this Commonwealth by reason of such real estate having been held by a corporation not authorized to hold the same by the laws of this Commonwealth.[66]

723. Validation of Title to Real Estate Taken by Foreign Corporations Prior to Registration of Such Corporations in Pennsylvania.

Whenever any corporation organized and existing under the laws of any other State, and as such authorized to hold and con-

(64) Act of June 15, 1897, P. L., 164, amending the Act of June 9, 1891, P. L., 249, which amended the Act of June 6, 1887, P. L., 350.

(65) Act June 24, 1895, P. L., 264. This act seems to differ from the preceding Act of June 9, 1891, in that the latter refers only to conveyances made prior to its passage, while the Act of 1895 operates prospectively. See, generally, Act of January 9, 1861, P. L., 2; May 1, 1861, P. L., 433; April 26, 1869, P. L., 96; May 8, 1876, P. L., 127; May 22, 1878, P. L., 85; April 8, 1881, P. L., 9; June 6, 1887, P. L., 350; June 9, 1891, P. L., 249.

(66) Act March 21, 1907, P. L., 21. See Acts of March 11, 1903, P. L., 23, and February 28, 1905, P. L., 27, of practically the same tenor.

vey real estate, has taken title to real estate situate within this Commonwealth, without having first complied with the laws of this Commonwealth relative to having known places of business and authorized agents for the transaction of its business, the title to such real estate, so taken and held, shall be good and valid, and such corporation may hold and convey the same with the same effect as though it had complied with all the provisions of the laws of this Commonwealth relating to corporations of other States doing business therein, prior to the time of taking title thereto: *Provided, however,* The said corporation shall have, prior to the passage of this act, complied with the laws of this Commonwealth in having a known place or places of business and an authorized agent or agents for the transaction of its business.[67]

724. Validation of Contracts Made by Foreign Corporations Before Registering in Pennsylvania.

Whenever any corporation organized and existing under the laws of any other State, and doing business within this Commonwealth, shall have heretofore entered into any contract, bond, or obligation with any person, firm, or corporation, without having first established a known place or places of business and designated an authorized agent or agents for the transaction of its business in this Commonwealth, the said contract, bond, or obligation shall be binding upon the parties thereto, and such corporation may enforce the same in the courts of this Commonwealth: *Provided,* That it has subsequently, and prior to the passage of this act, complied with the laws of this Commonwealth by establishing a known place or places of business and designating an authorized agent or agents for the transaction of its business within the same: *And provided, further,* That it shall, before commencing any suit upon such contract, bond, or obligation, it shall pay all taxes that would have accrued to the Commonwealth of Pennsylvania if it had complied with the laws of Pennsylvania at the time of beginning to do business therein.[68]

725. How Foreign Corporations May Become Domestic Corporations.

Corporations, created by or under the laws of any other State,

(67) Act April 25, 1907, P. L., 105.
(68) Act May 23, 1907, P. L., 205.

doing business in this State, and in which three or more of the stockholders are citizens of this State, and which are embraced within the corporations of the second class defined in section two (2) of an act, approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, entitled "An act to provide for the incorporation and regulation of certain corporations," may become corporations of this State, under the provisions of said last mentioned act, by preparing, having approved and recorded a certificate, in which shall be stated:

First. The name of the corporation.

Second. Its purpose.

Third. The place or places where its business is to be transacted.

Fourth. The term for which it is to exist.

Fifth. The names and residences of the stockholders and the number of shares held by each.

Sixth. The number of its directors, and the names and residences, of those elected for the current year.

Seventh. The amount of its capital stock and the number and par value of the shares into which it is divided.

Eighth. The legislation under which it was originally created.

Ninth. Its financial condition at the date of the certificate, showing capital stock paid in, funded debt, floating debt, estimated value of property and cash assets, if any.

Said certificates shall be accompanied by a certificate, under the seal of the corporation, showing the consent of a majority in interest of such corporation to such application for a charter, and to a renunciation of its original charter and of all privileges not enjoyed by corporations of its class, under the laws of this Commonwealth.[69]

Said certificates shall be acknowledged by at least three of the directors of said corporation, before the recorder of deeds of the county in which the chief operations are to be carried on or in which the principal office is situated, and said directors shall also make and subscribe an oath or affirmation before him, to be endorsed on the said certificate, that the statements contained therein are true. The said certificate shall then be produced to the Governor of this Commonwealth, who shall examine the same, and if he find it to be in proper form and within the purposes

(69) Sec. 1, Act June 9, 1881, P. L., 89.

named for corporations of the second class in the said second section of said Act of April twenty-ninth, one thousand eight hundred and seventy-four, before mentioned, he shall approve thereof and endorse his approval thereon, and direct letters patent to issue, in the usual form, incorporating said stockholders and their successors into a body politic and corporate in deed and in law by the name chosen; and the said certificate shall be recorded, in the office of the Secretary of the Commonwealth, in a book to be kept by him for that purpose, and he shall forthwith furnish the Auditor General an abstract therefrom, showing the name, location, amount of capital stock, and the name and address of the treasurer of such corporation; the said original certificate, with all its endorsements, shall then be recorded in the office for the recording of deeds in and for the county where the chief operations are to be carried on.[70]

From the date of said letters patent, said corporation shall be and exist as a corporation of this Commonwealth, under the provisions of law regulating corporations of its class and of its charter; and all of the rights, privileges, powers, immunities, lands, property and assets, of whatever kind or character the same may be, possessed and owned by the original corporation, shall vest in, and be owned and enjoyed by, the said corporation so created as fully and with like effect as if its original charter had remained in force, save as by general law and said certificate expressly stated otherwise; and all suits, claims and demands by said corporation in existence at the date of said new charter shall and may be sued, prosecuted and collected under the laws governing the said corporation prior to its new charter, and claims and demands of every nature and character in existence at the date of said new charter may be collected from and of said new chartered corporation, as fully and with like effect as if no change had taken place.[71]

Foreign corporations becoming domestic, under the provisions of the Act of June 9, 1881, supra, are required to give notice of their intended application, by advertisement. Bonus should be paid in advance and the application should aver that ten per centum of

(70) Sec. 2, Act June 9, 1881, P. L., 89.

(71) Sec. 3, Act June 9, 1881, P. L., 89.

the amount of capital stock authorized has been paid in to the treasurer, in cash.[72]

726. Corporations Chartered by Two States.

A corporation chartered by two States, with the same capacities and powers and intended to accomplish the same objects, exercising the same powers and fulfilling the same duties in both States, is a distinct and corporate body in each State. The legal presumption is, that the members of a corporation are citizens of the State that created it, and no averment or evidence to the contrary is admissible for withdrawing the suit from the jurisdiction of a court of the United States. A suit by a corporation created by the concurrent legislation of two States is a suit in which citizens of each State are joined as plaintiffs. If the defendant is a citizen of neither of these States, the suit cannot be maintained in a United States court.[73]

When two corporations of different States become merged by the co-operating legislation of those States the consolidated corporation, when acting in its corporate capacity in either of the States, acts under the authority of the charter of the State in which it is then acting, and under that only, the legislation of the other State having no operation beyond the territorial limits.[74]

When the officers of a New York railroad company contract with other parties of which the company is not one to share in the profits resulting from the construction and equipment of the railroad, and subsequently the company merges with a Pennsylvania railroad company, and such contract, though void in Pennsylvania being in violation of Art. 17, Sec. 6 of the Constitution of this Commonwealth and of the provisions of the Act of May 15, 1874, P. L., 178, is valid in New York as between the parties thereto, the contract may be enforced in Pennsylvania.[75]

727. Corporations Incorporated by the United States Not Foreign.

A corporation chartered by the Congress of the United States,

(72) National Metal Edge Box Co., 30 Pa. C. C., 273 (1904); Foreign Corporations, 5 Pa. C. C., 231 (1887); *Contra.* Sherman Mfg. Co., 12 Pa. C. C., 165 (1892); 1 D. R., 801.

(73) County of Allegheny *v.* Cleveland & Pitts. R. Co., 51 Pa., 228 (1865). This case follows the decision of the Supreme Court of the United States in Ohio & Miss. R. Co. *v.* Wheeler, 1 Black, 286.

(74) Rothschild et al. *v.* Roches. & Pitts. R. Co., 1 Pa. C. C., 620 (1886).

(75) Rumsey *v.* N. Y. & Pa. R. R. Co., 203 Pa., 579 (1902).

doing business in Pennsylvania, is not a foreign corporation within the meaning of Sec. 16, Act of June 7, 1879, (now repealed) which imposed an office license upon foreign corporations.[76]

728. Foreign Natural Gas Companies Have the Right of Eminent Domain.

Foreign corporations engaged in the natural gas business, which have complied with the requirements of the Act of April 22, 1874, have the right of eminent domain by virtue of Sec. 10, Act of May 29, 1885, P. L., 29.[77]

729. Foreign Corporations as Garnishees in Execution Attachment.

A foreign corporation which is qualified to do business in this State, by reason of having complied with the statutory requisites, may be made a garnishee in an execution attachment.[78]

730. Preferring of Creditors by Foreign Corporations Doing Business in Pennsylvania.[79]

As the New Jersey Act of March 5, 1895, prohibiting assignments for creditors and confession of judgments by insolvent corporations does not go to the organic power of the corporation, but affects only the remedy, it is of merely local application, and has no effect on New Jersey corporations doing business in Pennsylvania.[80]

A New York statute prohibiting a corporation which has refused to pay its obligations from making any assignment of its property in contemplation of insolvency, was not intended to avoid sales for a valuable consideration to a *bona fide* purchaser without notice of its insolvent condition. A contract of sale executed to plaintiffs by the vice-president of the corporation was ratified by the receipt by the company of the consideration paid, even if the authority of said vice-president was not established.[81]

(76) Com. *v.* Texas & Pacific Ry. Co., 98 Pa., 90; 10 W. N. C., 405 (1881).

(77) In re Ohio Valley Gas Co., 6 D. R., 200 (1897).

(78) Barr *v.* King & Miller, 96 Pa., 485 (1880); Jones *v.* N. Y. & E. R. Co., 1 Grant, 457; Com. Title Ins. Co. *v.* Brown, 11 Pa. C. C., 542 (1891).

(79) See Secs. 415 and 416.

(80) Borton *v.* Brines-Chase Co., 175 Pa., 209 (1896).

(81) Auffmordt *v.* Volgler, 5 D. R., 261 (1896). See Benev. Order of Active Workers *v.* Sanders, 28 W. N. C., 321 (1891).

The directors of a New York corporation, at a meeting held in New York, authorized the president of the company to prefer a New York creditor, by confessing judgment to him in Pennsylvania, though the corporation was at that time insolvent, and the laws of New York forbid the preference of creditors by corporations upon the eve of insolvency. Held, that the fund arising from the sale of property under the judgment was properly awarded to the execution creditor, and such creditor cannot be deprived of his rights because the foreign corporation was doing business in Pennsylvania without having complied with the requirements of the Pennsylvania statutes.[82]

731. Actions Ex Delictu Against Foreign Corporations for Acts Committed in Another State.

An action may be maintained in Pennsylvania against a foreign corporation (process having been served here) to recover damages in an action *ex delictu,* for negligence causing death in another State, where a statute of such State is similar to the Pennsylvania statute authorizing such action. While the foreign statute has no extra-territorial force, rights under it, not contrary to the policy of this State, will, by comity, be enforced by remedies according to the procedure of this State.[83]

732. When the Federal Courts Have Jurisdiction of Foreign Corporations.

The word "citizen" in the Constitution of the United States, means a human being—a natural person, capable of acting, contracting, suing and being sued without legislative aid—a person of whom allegiance is predicable, and who may be guilty of treason. A corporation is not, *per se,* a citizen within the meaning of the third article of the Constitution of the United States. When a corporation sues or is sued, the governing officers, by whatsoever name called, are the substantial party, and if they are citizens of the State which created the corporation, and the other party is a citizen of another State, the Federal courts have jurisdiction, and the cause is removable, under the Judiciary Act of 1789.[84]

(82) East Side Bank *v.* Columbus Tanning Co., 170 Pa., 1 (1895).

(83) Knight *v.* West Jersey R. Co., 108 Pa., 250 (1885). See Usher *v.* West Jersey R. R. Co., 126 Pa., 206 (1889).

(84) Wheedon *v.* Camden & Amboy R. Co., 1 Grant, 420 (1856).

Under the Act of Congress of March 3, 1887, a Minnesota corporation is not liable to be sued in the Circuit Court for the Eastern District of Pennsylvania by a non-resident of Pennsylvania.[85]

When the ground for jurisdiction is the residence of plaintiff and defendant in different States, a corporation or other defendant can only be sued in the United States courts in the State of its own creation, or in that of which the plaintiff is a citizen.[86]

A single foreign creditor of an insolvent Kansas corporation may sue one of its stockholders, a citizen of Pennsylvania, in the United States courts, in an action of assumpsit upon the liability imposed by the laws of that State upon stockholders to pay the debts of the corporation to an amount equal to the stock owned by them, respectively.[87]

733. Names of Foreign Corporations.

If a foreign corporation take the name of a domestic one, it will be enjoined by a court of equity from the use of such name in Pennsylvania, although there may have been no fraudulent intent in taking such name, and though the foreign corporation may have duly registered in the office of the Secretary of the Commonwealth, under the provisions of the Act of 1874.[88]

It was originally held by the Secretary of the Commonwealth, that a foreign corporation had a status before his department to object to the incorporation of a domestic company with the same name as the said foreign corporation,[89] but he afterwards reversed himself and held that it did not have such status, but must apply to the courts for redress.[90]

734. Stockholders in Foreign Corporations.

It was originally held that a court of equity in Pennsylvania could exercise no jurisdiction to compel stockholders residing

(85) Elkhart Nat. Bank *v.* Northwestern Guarantee Loan Co., 7 D. R., 13 and 287 (1898). (U. S. Cir. Ct.)

(86) Shaw *v.* Quincy Mining Co., 145 U. S., 444 (1892).

(87) Mechanics' Savings Bank *v.* Fidelity I. T. & S. Co., Admr., U. S. Circ. Ct., 7 D. R., 365 (1898).

(88) American Clay Mfg. Co., a Corpn. of Pa. *v.* Amer. Clay Mfg. Co., a Corpn. of New Jersey, 198 Pa., 189 (1901).

(89) Bradley Fertilizer Company's Charter, 19 Pa. C. C., 271 (1897).

(90) Bradley Fertilizer Company's Charter, 19 Pa. C. C., 477 (1897); 6 D. R., 424.

within the State of a foreign corporation to pay the stock subscribed to such corporation, on the application of a creditor of such company,[91] but this appears to be no longer the law.

The obligation of a stockholder of a foreign corporation is to be measured as to its extent and character by the laws of the State under the laws of which the corporation was organized, and where a court of last resort of a State under the laws of which a foreign corporation was organized has construed a statute so as to uphold the right of a creditor of the corporation to proceed directly against a stockholder, the courts of this State are bound to follow the decision.[92]

The Supreme Court of this State held in the case of Cushing *v.* Perot, 175 Pa., 66 (1896) that the liability imposed by the laws of Kansas upon stockholders of corporations of that State for an additional amount, equal to the stock owned by them, was contractual, and not penal, in character, and that where a receiver had been appointed in Kansas, the right to sue the stockholders upon their statutory liability was in the receiver, as an asset, and that a single foreign creditor could not sue a Pennsylvania holder of the stock of such company upon such statutory liability.

In a later case, however, the Supreme Court held, on the authority of Sleeper *v.* Norris, 59 Kansas, 555, that such foreign creditor might proceed against a Pennsylvania stockholder upon such liability, under the circumstances named. Held, however, that the Pennsylvania stockholder might set off the indebtedness of the corporation to him, and show that the creditor had already proceeded against other stockholders in Kansas, whereby he may have collected part or all of his claim.[93]

And where a judgment creditor of a Kansas corporation sued a Pennsylvania stockholder to enforce such liability, it appearing that the judgment was based upon an accommodation endorsement by the corporation, held, that the defendant could relieve himself from his liability only by showing by the charter of the corporation that the incurring of the debt was not essential to the transaction of its ordinary affairs and within the legitimate objects of its creation.[94]

(91) Bank of Virginia *v.* Adams, 1 Pars., 534 (1850).

(92) Ball *v.* Anderson, 196 Pa., 86 (1900).

(93) Ball *v.* Anderson, 196 Pa., 86 (1900). See Sec. 732.

(94) First Nat. Bank of Pgh., Kansas *v.* Darlington, 25 Pa. Super. Ct., 438 (1904).

A demurrer will be sustained, on the ground that there is an adequate remedy at law, to a bill filed by a foreign receiver, appointed especially to enforce the additional liability of forty-seven stockholders in an insolvent Minnesota corporation, when the bill alleged that the liability of the defendants had been fixed at the full amount of their holdings, and that the decree of the Minnesota court was conclusive upon them. It seems that the complainant's appointment as a receiver by a Minnesota court does not entitle him to sue in the Circuit Court of the United States, for the Eastern District of Pennsylvania, and that defendants are not bound by the proceedings in Minnesota.[95]

A Colorado savings bank made an assignment for the benefit of its creditors. Under the laws of Colorado stockholders in banks are individually liable for debts of their banks in double the amount of the par value of the stock owned by them. In construing this law, the Supreme Court of Colorado held, in Zang *v.* Wyant, 25 Colo., 551, that the proper procedure to enforce such liability is by a suit in equity by a creditor or creditors for the benefit of all the creditors. A bill was brought in Pennsylvania by certain creditors of the bank against a resident stockholder. Held, that the bill should have been filed by, or on behalf of, all the creditors and the corporation itself, and all the shareholders should have been made parties defendant.[96]

Where a citizen of Pennsylvania, a stockholder in a foreign corporation, contracts with such corporation, he cannot set up, in replevin for goods furnished by him to such corporation and by it sold to a *bona fide* purchaser, that the corporation was not authorized to do business in Pennsylvania. As a participant in the transaction he is estopped.[97]

By the Constitution and laws of Ohio, the stockholders of a certain corporation formed under the laws of that State were made personally liable to the creditors of the corporation in an amount equal to the stock subscribed. Said company having become insolvent and all its assets being exhausted, all the stockholders thereof were residents of Pennsylvania and were capable of being served with process. Held, that the courts of this Commonwealth had jurisdiction to enforce against said stockholders the personal

(95) Hale, Receiver *v.* Allinson et al., 10 D. R., 13 (1901).
(96) Bates *v.* Day, 198 Pa., 513 (1901).
(97) Kilgore *v.* Smith, 122 Pa., 48 (1888).

liability above mentioned in favor of the creditors of the corporation.[98]

735. Foreign Attachment.[99]

A private corporation is, in contemplation of law, resident at the place of its incorporation, and such a corporation chartered under the laws of another State does not, by maintaining an office in Pennsylvania where its business is transacted by its treasurer who resides in the State, gain a residence so as to exempt it from the process of foreign attachment.[100]

A writ of foreign attachment may be issued against any foreign corporation, aggregate or sole, and such attachment and proceedings may be dissolved upon an appearance by an attorney, and a deposit made or security given for the debt or demand in such sum and form as the court from which such writ issues shall direct.[1]

Creditors of foreign corporations doing business in Pennsylvania may proceed by summons served upon the agents of such corporations, or by foreign attachment.[2] Foreign attachment will not lie against foreign corporations not doing business in Pennsylvania, though the officers thereof reside in said State.[3]

The stock held by non-residents of Pennsylvania in a foreign corporation doing business in said State, may not be reached by foreign attachment, although such company may have its principal office therein.[4]

Non-resident creditors of a foreign corporation cannot attach the assets thereof, in this State, and hold them as against a receiver duly appointed by the courts of another State to collect and distribute all the assets of a company among all the creditors.[5]

A plaintiff in a foreign attachment who was a director and stockholder of the corporation against which the action is brought,

(98) Aultman's Appeal, 98 Pa., 505 (1881).

(99) See Secs. 636, 639.

(100) Beal & Simons *v.* Toby Valley Supply Co., 2 D. R., 671 (1893).

(1) Sec. 76, Act June 13, 1836, P. L., 568.

(2) Beal *v.* Toby Valley Supply Co., 2 D. R., 671 (1893); Zucker *v.* Froment, 5 D. R., 579 (1896); Pain's Pyro-Spectacle Co. *v.* Lincoln Park & Steamboat Co., No. 1, 19 Pa. C. C., 21 (1896); Buffalo Coal Co. *v.* Rochester & State Line Ry Co., 8 W. N. C., 126 (1880).

(3) Sheehan *v.* Frederick, 2 York Leg. Rec., 10 (1881).

(4) Greenwood *v.* Hat Sweat Mfg. Co., 13 W. N. C.. 447 (1883).

(5) Hintermeister *v.* Ithaca Organ & P. Co., 1 Pa. C. C., 466 (1886).

and knew, therefore, that such corporation was insolvent before the writ of attachment was issued, and who had been restrained by the court decreeing the dissolution from interfering with the assets of the company, may not maintain such attachment.[6]

Non-residents of Pennsylvania may bring writs of foreign attachment against foreign corporations in Pennsylvania.[7]

The cars of foreign railroad companies may be seized by writ of foreign attachment, when the same are found within this State.[8]

A foreign corporation is subject to foreign attachment although it has an agent in the State, or even in the very county in which suit is brought.[9]

A debt due by one foreign corporation to another, which is not payable within the jurisdiction, cannot be attached, even though the garnishee corporation is doing business in Pennsylvania in compliance with the provisions of the Act of April 22, 1874, P. L., 108.[10]

A citizen of Pennsylvania who is a member of a corporation organized for the mutual benefit of its members, chartered by the State of New York, cannot maintain a foreign attachment against the company in Pennsylvania, when it was insolvent at the time the writ issued, and a New York court of competent jurisdiction had determined the fact of insolvency and appointed a receiver.[11]

When a New Jersey corporation borrows money in Pennsylvania, and afterwards gives a bond and mortgage on its New Jersey property as collateral security for the loan and not in payment thereof, the original obligation remains in force and may be made the subject of a foreign attachment in Pennsylvania, without first foreclosing the mortgage as required by the New Jersey statute.[12]

(6) Hintermeister *v.* Ithaca Organ & P. Co., 1 Pa. C. C., 466 (1886).

(7) Clark Co. *v.* Toby Valley Supply Co., 14 Pa. C. C., 344 (1894); Beal & Simons *v.* Toby Valley Supply Co., 13 Pa. C. C., 273 (1893); Datz *v.* Chambers, 14 Pa. C. C., 643 (1894).

(8) Buffalo Coal Co. *v.* Rochester & State L. Ry. Co., 8 W. N. C., 126 (1880).

(9) Diener *v.* Wopsononock Hotel Co., 23 Pa. C. C., 376; 10 D. R., 57 (1901); Pierce *v.* McLaughlin Elec. Co., 28 W. N. C., 311 (1891).

(10) Opdyke *v.* Murphy Iron Wks. deft. and Babcock & Wilcox Co., Garnishees, 10 D. R., 68 (1901).

(11) McKean *v.* N. Y. National B. & L. Assn., 10 D. R., 197 (1901).

(12) Van Horn *v.* McInnes Brick Mfg. Co., 5 D. R., 701 (1896).

736. Service of Summons Upon Foreign Corporations[13]—Bail on Appeal in Actions Against the Same.

In all suits or actions hereafter to be brought in any court of record in this Commonwealth, against any foreign corporation or body corporate, not holding its charter under the laws of this Commonwealth, every judgment, verdict or award rendered against such corporation shall be final and conclusive, unless the said defendants, in addition to the usual proceedings in cases of appeal, shall give good and sufficient bail in the nature of bail absolute, for the payment of such sum or sums as shall finally be adjudged to be due to the plaintiff or plaintiffs, together with interest and costs thereon;[14] and in the commencement of any suit or action against any such foreign corporation, process may be served upon any officer, agent or engineer of such corporation, either personally or by copy, or by leaving a certified copy thereof at the office, depot, or usual place of business of said corporation; and such service shall be good and valid in law to all intents and purposes.[15]

A return of service under the Act of March 21, 1849, Sec. 3, supra, which omits to set forth the character of the agent served is *prima facie* evidence of good service, but this presumption may be rebutted by proof to the contrary.[16]

Sec. 3 of the Act of March 21, 1849, relative to the service of process on foreign corporations, and the decisions in Knight *v.* R. Co., 108 Pa., 250, and Usher *v.* R. Co., 126 Pa., 210, contemplate foreign corporations doing business in this State. Officers of other foreign corporations, entering the State for their own business or pleasure do not bring their corporations with them and subject them to the jurisdiction of Pennsylvania.[17]

Suit may be instituted against a foreign corporation by the ser-

(13) See Secs. 600, 601, 602, 603.

(14) Adams *v.* Lancaster Paper Mills Co., 10 D. R., 266 (1901); Dreibelbis *v.* Lancaster Paper Mills Co., 17 Lanc. Law Rev., 399.

(15) Sec. 3, Act March 21, 1849, P. L., 216. See Sec. 585.

(16) Hagerman *v.* Empire Slate Co., 97 Pa., 534 (1881); Fulton et al. *v.* Commercial Traveller's Mut. Accident Assn., 172 Pa., 117 (1895).

(17) Phillips *v.* Burlington Library Co., 141 Pa., 462 (1891); McConkey *v.* Peach Bottom Slate Co., 3 D. R., 594 (1894); Branson *v.* Trump Bro.'s Machine Co., 16 Phila., 112 (1882). The solicitation of freight within the Commonwealth by a foreign railroad company does not subject it to the service of process from the Courts of Pennsylvania. Wilkinson's Sons *v.* Atlantic Coast Line R. R. Co., 34 Pa. C. C., 347 (1907).

vice of process upon an agent of said corporation within this Commonwealth in the mode prescribed by the Act of March 21, 1849, Sec. 3, notwithstanding the fact that said corporation has failed to establish an office within the State and to report the name of its agent, in compliance with the requirements of Sec. 5, Art. 16, of the Constitution of Pennsylvania, and the Act of April 22, 1874. Though the transaction of business by said corporation without such compliance is undoubtedly illegal, the company cannot take advantage of this illegality to escape service of process.[18]

A foreign corporation not doing business in Pennsylvania, at the beginning of a suit, cannot be brought within the jurisdiction of the courts of this State except with its consent, and a single transaction in Pennsylvania will not bring the corporation within the jurisdiction of the courts of that State.[19]

Service upon a soliciting agent of a foreign insurance company is not good when such company has a general agent and attorney for Pennsylvania residing within the State.[20] Nor is service upon the examining physician of a foreign insurance company good.[21]

It will be assumed that a foreign corporation doing business in Pennsylvania, registered as required by the Act of April 22, 1874, P. L., 108, and that the registration continued, when no evidence is offered of its withdrawal. Hence, when a foreign corporation made a contract while doing business in Pennsylvania, and afterwards ceased all operations whatever therein, held, that the summons in a suit brought against the corporation might be served on the persons described as directors resident within the county.

It seems that when the Act of April 22, 1874, applies to a foreign corporation doing business in Pennsylvania, the provisions for service of process of the Acts of March 21, 1849, P. L., 216, and April 8, 1851, P. L., 354, are superseded; and also that when registration under said Act of 1874 is to be presumed (to avoid the alternative presumption of a penal offense on the part of the agents of the foreign corporation within the State and doing busi-

(18) Hagerman *v.* Empire Slate Co., 97 Pa., 534 (1881).

(19) McConkey *v.* Peach Bottom Slate Co., 14 Pa. C. C., 514 (1892).

(20) Connors *v.* Prudential Ins. Co., 1 D. R., 720 (1892).

(21) Fulton *v.* Commercial Travelers' Mut. Accident Assn. of America, 172 Pa., 117 (1895).

ness for it) such registration must be presumed to continue, in the absence of proof on the subject.[21*]

A sheriff returned the summons in an action against a corporation "Served by delivering a true and attested copy of the within writ to A, secretary of the corporation defendant, and by making known to him the contents thereof." In the agreement filed with the affidavit of claim it appeared that the defendant corporation was styled "of Wheeling, W. Va." Rule obtained to show cause why service should not be set aside, an affidavit that defendant was a foreign corporation not engaged in business in Pennsylvania, and had no office there, being filed in support of rule. Held, that the return showed a valid service on the corporation, under the above act, and was conclusive between the parties. Circumstances rendering a foreign corporation suable need not be set forth in the præcipe nor summons.

"The question here is not whether the courts of Pennsylvania can acquire jurisdiction of the person of a corporation of another State by the mere presence in this State of an officer of that corporation. Should service be made upon an officer of a foreign corporation, when he was casually present, and said corporation was not suable in the courts of this State upon the contract or matter on which the action is founded, then a plea to the jurisdiction is the proper remedy." [22]

Service upon the president of a foreign corporation at his dwelling house by leaving a copy of the summons with an adult member of the family is good.[23]

A return by a sheriff stating that service was made upon a foreign corporation by giving the superintendent, agent and chief manager (naming him) of the defendant, at its office in the county, a true and attested copy of the summons, and making known to him the contents thereof, is good.[24]

The following return was held to be good, under the act: "Served a true and attested copy of the within writ personally on A. B., an agent of the within named defendants, and made known to him the contents thereof." [25]

(21*) American Steel & Wire Company of N. J. *v.* Raleigh Coal & Coke Co., 10 D. R., 285 (1901).

(22) Benwood Iron Works *v.* Hutchinson & Bro., 101 Pa., 359 (1882).

(23) Johnson *v.* Amer. Bill Posting Co., 13 Pa. C. C., 96 (1891).

(24) Wintermute *v.* Central R. Co., 5 Pa. C. C., 648 (1888).

(25) Patton *v.* Ins. Co., 1 Phila., 396 (1852).

A return of service upon a foreign corporation is sufficient if it simply states that service was made upon an agent of the company, without more, and evidence will not be heard for the purpose of showing its insufficiency, upon a rule to set it aside.[26]

A return need not aver that the defendant is a foreign corporation.[27]

Service on the secretary of a corporation within the jurisdiction of the court is sufficient.[28]

737. The Courts of Pennsylvania Will Not Interfere With the Internal Management of Foreign Corporations.

A court of equity in Pennsylvania will not entertain a stockholders' bill against a foreign corporation, where the matters complained of in the bill relate to the internal management of the company.

When the act complained of in such bill affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meetings or through its agents, the board of directors, such action is the management of the internal affairs of the corporation, and it is immaterial that the visible, tangible property of the foreign corporation is situate within the State.[29] Otherwise, however, when the corporation has no office and does no business in the State in which it was incorporated but all its property is located and all its business carried on in Pennsylvania, its stockholders with one exception all being residents of this Commonwealth.[30]

And when a Pennsylvania creditor of a foreign corporation attempts to collect by execution a judgment which is in part fraudulent, with the consent of a majority of the stockholders and directors, out of property within the jurisdiction of a Pennsylvania court, the same being all the property which the company has,

(26) Kalbach *v.* N. Y. Ry. Co., 11 W. N. C., 174 (1881).

(27) Nat. Bank of the Republic *v.* N. Y., C. & H. R. R. R. Co., 8 W. N. C., 252 (1880).

(28) Benwood Iron Works *v.* Hutchinson, 12 W. N. C., 495 (1882); 101 Pa., 359.

(29) McCloskey *v.* Snowden, 212 Pa., 249 (1905); Madden et al. *v.* Edison Electric Light Co., 181 Pa., 617 (1897); Madden *v.* Penn Electric Lt. Co., 199 Pa., 454 (1901).

(30) Arnold *v.* Russell Car & Snow Plow Co., 31 Pa. C. C., 38 (1905).

such court will enjoin the collection of the judgment unless a *remittitur* is filed for such part thereof as is shown to be fraudulent.[31]

A bill in equity cannot, therefore, be maintained to procure the cancellation of the stock of a foreign corporation and to prevent certain stock from being voted, for both grounds relate to the internal management of the company, [32] and a court of equity has no jurisdiction to control an election in a foreign corporation.[33]

The courts of Pennsylvania are bound by the decisions of the courts of a sister State in relation to the organization of a corporation under the statutes of that State.[34]

738. Pennsylvania Courts May Compel Foreign Corporations to Levy Assessments on Stock.

The courts of Pennsylvania have jurisdiction to compel a foreign corporation doing business in Pennsylvania to levy an assessment upon stock not fully paid in, in order to satisfy creditors of the corporation.[35]

739. Foreign Investment and Bond Companies Defined.

Any and every trust company, investment company, loan company, bank or banking company, bond company, title insurance company, security company, or any other similar company, corporation, association, or joint stock or limited partnership association, formed, incorporated, or organized under the laws of any other State or Territory, the District of Columbia, or any foreign country, who [which] shall engage within this Commonwealth, either directly or indirectly, in the negotiation, offering for sale, or sale of any bond or bonds, debentures, certificate or certificates, scrip, mortgage or mortgages; or of [in the] receiving single payments, regular installment payments, or contributions to be held or used in accordance with any plan of accumulation or investment; or [and every] corporation(s) or as-

(31) Thompson *v.* Century Leather Enameling Co., 15 D. R., 435 (1904).

(32) American Grease Co. et al. *v.* Vogellus et al., 23 Pa. C. C., 664 (1900); 9 D. R., 217.

(33) Hartley et al. *v.* Welsh et al., 23 Pa. C. C., 78 (1899); Com. *v.* Leisenring, 15 Phila., 215 (1881).

(34) Grant *v.* Henry Clay Coal Co., 80 Pa., 208 (1876).

(35) North et al. *v.* Weaver Elec. Mail Box Mfg. Co., 3 Pa. C. C., 316 (1887). See, however, Morris *v.* Stevens, 6 Phila., 488 (1868).

sociation(s) who [which] assume(s) the payment of fixed obligations, and issue in connection therewith a contract based upon payments being made upon installments or single payment plan, under which all or any part of the total amount received is to be prepaid at some future time upon contract issued, either with or without profit, shall be deemed a foreign corporation, under the meaning of this act: *Provided, however,* That nothing in this act contained shall apply to a corporation which issues bonds, debentures, certificates, script, or mortgages merely as an incident to its primary corporate business, as stated in its charter, consisting of a manufacturing, mercantile or other operating business, dealing in tangible assets.[36]

740. Forbidden to Do Business in Pennsylvania Without a License.

From and after the first day of July, Anno Domini one thousand nine hundred and seven, no such foreign corporation, except it be licensed as provided heretofore [hereinafter] by law, shall engage within this Commonwealth, either directly or indirectly, in the negotiation, offering for sale, or sale of any bond or bonds, debenture or debentures, certificate or certificates, scrip, mortgage or mortgages, lien or liens, upon property located without this Commonwealth, or other security or securities, or chose or choses in action, issued by such foreign corporation or by any other such foreign corporation; or in receiving single payments, regular installment payments, or contributions to be held or used in any plan of accumulation or investment, or in assuming the payment of fixed obligations, and issue [issuing] in connection therewith a contract based upon payments being made upon installments or single payments, under which all or any part of the total amount received is to be repaid at some future time upon contract issued, either with or without profit, unless such foreign corporation shall have first been licensed to transact such business, within the Commonwealth of Pennsylvania, by the Commissioner of Banking, in the manner hereinafter prescribed and provided. If any such foreign corporation shall, after the said date, engage within the Commonwealth of Pennsylvania in the negotiation, offering for sale, or sale of securities of the classes above enumerated and set forth, without first having been licensed in the manner by this act provided, the

(36) Sec. 1, Act June 7, 1907, P. L., 446.

said corporation shall be subject to a penalty of one thousand dollars for each negotiation or sale of such security or securities, to be recovered in an action to be brought for that purpose by the Attorney General.[37]

741. Agents of Such Companies to be Licensed.

No person or persons, partnership, corporation or association, or limited partnership association, or joint stock association shall act, within this Commonwealth, as the agent, solicitor, or representative of any foreign company, corporation, association, joint stock or limited partnership association, for the negotiation, offering for sale, or sale of any of the securities enumerated and described in the first section of this act, [nor] shall negotiate and sell the same, on commission or otherwise, unless such foreign company, corporation, association, or limited partnership, or joint stock association shall have been duly licensed to conduct such business within this Commonwealth, under the provisions of this act; nor until such person or persons, partnership, corporation or association, or limited partnership or joint stock association shall have first procured from the Commissioner of Banking a license authorizing him, them or it to act as such agent, solicitor, or representative within the Commonwealth, for said purpose; and every such person or persons, partnerships, corporation or association, or limited partnership or joint stock association, acting as such agent, solicitor, or representative, for such purpose, within the Commonwealth, or negotiating or selling such securities on commission, or otherwise, without first having applied for and received a license as herein required, shall be guilty of a misdemeanor, and shall be subject, upon conviction, to a penalty of fifty dollars, for each and every sale of such securities so negotiated or made. A license fee of two dollars shall be collected and paid upon the issue of each license issued under the provisions of this section, and a like sum annually thereafter, to be applied to the expenses of the Banking Department.[38]

741½. Deposits to be Made by Such Companies—Depositaries—Payment of Income—Withdrawal of Deposits.

No foreign company, corporation, association, joint stock as-

(37) Sec. 2, Act June 7, 1907, P. L., 446.
(38) Sec. 3, Act June 7, 1907, P. L., 446.

sociation, or limited partnership association, as aforesaid, shall be licensed to negotiate, offer for sale, or sell, within this Commonwealth, securities as enumerated and described in the first section of this act, unless it has deposited with some trust company of this Commonwealth, to be approved by the Commissioner of Banking, the sum of one hundred thousand dollars in bonds of the United States or of the State of Pennsylvania, or of cities, counties, boroughs, or school districts of this Commonwealth, as security for the fulfillment of its contracts. None of the securities so deposited with the State of Pennsylvania shall be withdrawn by any such company, corporation, or association without the permission of said Commissioner, in writing, and under the seal of his office; and no such withdrawal shall be permitted which will reduce the amount so deposited to less than one hundred thousand dollars. Exchanges of such bonds may be made, from time to time, with the approval of the Commissioner of Banking; and, if any of said bonds are called in for payment, the proceeds thereof shall remain in the hands of the depositary until other bonds of the classes above mentioned shall be substituted in like amount for the bonds so paid; whereupon such depositary shall, with the permission in writing of said Commissioner, pay over such proceeds to the association, company, or corporation depositing the bonds. When any such company, corporation, or association shall desire to discontinue, within this Commonwealth, business of the nature hereinbefore set forth and described, it may make application by petition to the Court of Common Pleas of Dauphin county, setting forth its resources and liabilities, within and without this Commonwealth, and particularly the sales and contracts of sale of securities, of the classes hereinbefore enumerated, made within the Commonwealth, and its liabilities thereon, if any; and thereupon the said court, after due hearing, of which the Commissioner of Banking shall have such notice as the said court may determine, may make such order as will permit the withdrawal of said bonds, or a part thereof, and with [will] at the same time fully protect the rights of all creditors and persons contracting with, or purchasing from, the said company, corporation, or association within the Commonwealth. Trust companies acting as depositaries under the provisions of this section shall pay over the income of the bonds, deposited with them as aforesaid, to the company, corporation, or association depositing them, and shall make report in writing, signed or sworn to by the president or

treasurer thereof, to the Commisioner of Banking semi-annually, on the first day of January and the first day of July in each year, setting forth the amounts and kinds of bonds deposited with them, as aforesaid, and by what company, corporation, or association the same have been deposited; and for failure to make such report within thirty days after the time fixed as aforesaid for making such reports, the trust company failing to make the same shall be liable to a penalty of fifty dollars, to be recovered in the name of the Commonwealth, as other penalties are by law recoverable, and the amount so recovered shall be paid into the State treasury. The trust company selected by any such company, corporation, or association as its depositary of bonds, under this section, may be changed, from time to time, by such company, corporation, or association, with the approval in writing of the Commissioner of Banking.[39]

743. Companies to Register in Office of the Secretary of the Commonwealth.

No foreign company, corporation, association, or limited partnership, or joint stock association, as aforesaid, shall be licensed to engage or engage in the negotiation, offering for sale, or sale of securities, as enumerated and described in the first section of this act, within this Commonwealth, unless the same shall have first registered in the office of the Secretary of the Commonwealth, agreeably to the provisions of the Act of April twenty-second, one thousand eight hundred and seventy-four, in the office of the Auditor General, as required by section nineteen of the Act of June first, one thousand eight hundred and eighty-nine, and in the office of the Commissioner of Banking, agreeably to the provisions of the Act of February eleventh, one thousand eight hundred and ninety-five.[40]

744. Securities Bearing More Than Eight Per Cent. Interest Not to be Sold—Penalty.

It shall be unlawful for any such foreign company, corporation, association, limited partnership association, or joint stock association, as aforesaid, or for any agent, solicitor, or representative thereof, to negotiate, offer for sale, or sell, within this Com-

(39) Sec. 4, Act June 7, 1907, P. L., 446.
(40) Sec. 5, Act June 7, 1907, P. L., 446.

monwealth, any bond or bonds, debenture or debentures, certificate or certificates, scrip, mortgage or mortgages, or other security or securities, or chose or choses in action, by the terms of which, or by reason of any special contract or contracts made in relation to which, a greater amount than eight per centum per annum is agreed or contracted to be paid on the principal thereof, or any bonus, premium, or other amount, or any valuable thing or privilege, is to be paid or given, in addition to the principal amounts of said security and interest thereof, as herein provided.

Any such foreign company, corporation, limited partnership association, or joint stock association, so offering for sale, negotiating, or selling such securities, as in this section aforesaid described, shall forfeit its license, be prohibited from doing business within this Commonwealth, and be subject to a penalty of one thousand dollars for each offense, to be recovered in an action to be brought for that purpose by the Attorney General; and any agent, solicitor, or representative of such company, corporation, association, limited partnership association, or joint stock association, offering for sale, negotiating, or selling such securities, in such capacity or on commission, shall be guilty of a misdemeanor, and be subject, on conviction thereof, to a penalty of five hundred dollars for each offense: *Provided, however,* That nothing herein contained shall be held to prohibit the distribution of surplus earnings or accumulations.[41]

745. Companies to Maintain a Reserve Fund—Penalty for Failure to Do So.

Every foreign company, corporation, association, limited partnership association, or joint stock association engaged in the negotiation and sale, within Pennsylvania, of their own bonds, debentures, certificates, or other securities, as described in the title of this act, shall set apart and keep invested as a reserve fund, no portion of which shall be applied to the expenses of such company, corporation, or association, such sum or sums, apportioned from the periodical payments made and to be made upon any and all bonds, certificates, debentures, or obligations issued by such company, corporation, or association, in accordance with the terms and conditions thereof, as, together with interest thereon at a rate not exceeding four per centum per annum, compounded

(41) Sec. 6, Act June 7, 1907, P. L., 446.

annually, shall, at the maturity of such bonds, certificates, debentures, or obligations, equal the principal sum therein guaranteed to be paid by such company, corporation, or association, less any sum or sums previously paid or loaned to the holder or holders on account thereof: *Provided, however,* That nothing contained in this act shall be construed to prohibit the payment, by such company, corporation, or association, of accumulations, in addition to said principal sum guaranteed on the bonds, certificates, debentures or obligations issued by it, at the date of their final maturity.

No such foreign company, corporation, or association, conducting the business aforesaid, other than as provided in this act, shall be licensed to offer for sale, negotiate, or sell securities as hereinbefore enumerated within this Commonwealth; nor shall any such company, corporation, or association deal in, negotiate, offer for sale, or sell, within this Commonwealth, the bonds, scrip, or other securities, of any other foreign company, corporation, or association which violates the provision herein contained as to the setting apart and keeping invested of a reserve fund; nor shall the agents, solicitors, or representatives of such company, corporation, or association offer for sale, negotiate, or sell such obligations. Any such foreign company, corporation, or association, so offering for sale, negotiating or selling such securities, except as hereinbefore provided, shall forfeit its license, be prohibited from doing business in this Commonwealth, and be subject to a penalty of one thousand dollars for each offense, to be recovered in an action to be brought by the Attorney General for that purpose; and any agent, solicitor, or representative thereof so offering for sale, negotiating, or selling such securities, in such capacity or on commission, shall be guilty of a misdemeanor, and be subject, upon conviction thereof, to a penalty of fifty dollars for each offense.[42]

746. Powers of Commissioner of Banking in Examination of Accounts of Such Companies.

The Commissioner of Banking shall have the same powers, for the examination of accounts, books, papers, and affairs of said foreign companies, corporations, associations, limited partnership and joint stock associations, as are now vested in him by law for the examination of banks, foreign companies, corporations, asso-

(42) Sec. 7, Act June 7, 1907, P. L., 446.

ciations, and joint stock and limited partnership associations; and shall, on making application for license under the provisions of this act, file with the Banking Commissioner a stipulation and agreement that the offices, books, accounts, and papers thereof, wherever located, shall be subject to the examination of said Commissioner, as fully and in the same manner as if the same were located within the State of Pennsylvania. Mileage at the rate of ten cents per mile shall be paid by said foreign companies, corporations, associations, limited partnership and joint stock associations, to the Commissioner of Banking, for the use of the Commonwealth, on account of the travel of the examiners, appointed by said Commissioner, for the examination of the books, accounts, and affairs thereof, in addition to the expenses enumerated in the Act of February eleventh, one thousand eight hundred and ninety-five, to the payment of which expenses the said companies, corporations, and associations are hereby made subject. If upon examination of any of the said foreign companies, corporations, associations, limited partnership or joint stock associations, the same should appear to be insolvent or conducting their business according to hazardous methods, or that their affairs are in an unsafe or unsound condition, or in the event of the failure of any such foreign company, corporation, association, limited partnership, or joint stock association to promptly pay the mileage and examination fees herein provided, the Commissioner of Banking may, in his discretion, and after due notice to such foreign company, corporation, association, limited partnership or joint stock association, revoke and annul their license to do business within this Commonwealth.[43]

(43) Sec. 7, Act June 7, 1907, P. L., 446.

CHAPTER XXXI.

LOCAL TAXATION OF CORPORATIONS.

747. System of Taxation in Pennsylvania.
748. Exemption from Local Taxation of Public Service Corporations.
749. What Property is and what is not Essential to the Exercise of the Franchises of Public Service Corporations.
750. Local Taxation of Street Railway Companies.
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771. Mercantile and Other License Taxes.
772. Taxation of Corporations Incorporated under Special Acts—Exemptions.
773. The Constitution of 1874 does not Repeal Exemptions from Taxation Granted to Corporations by Special Acts.

747. System of Taxation in Pennsylvania.

In Pennsylvania, contrary to the practice which obtains in most if not all other States, the objects of local taxation are separate and apart from those subject to State taxation, the local and State tax systems being wholly different. County, school,

road and poor taxes are laid on real estate of all kinds including factories, etc., horses and cattle over four years of age, and offices, posts of profit, professions, trades and occupations. In townships of the first class, boroughs and cities additional revenue is raised by the imposition of taxes on certain specified subjects, some of which are imposed under the police power and others under the taxing power.

The State revenues are derived principally from specific taxes upon corporations, which will be treated of in the next chapter, but also from licenses of various kinds and certain other miscellaneous sources.

Corporations, other than public service corporations, are taxed locally upon their real estate and horses and cattle over four years of age, precisely the same as individuals, and public service corporations are taxable on so much of such property owned by them as is not essential to the exercise of their corporate franchises. There will be no occasion, therefore, for discussing in this chapter the local taxation of corporations other than public service corporations, although the impositions to which all classes of corporations may be subjected in boroughs and cities will be referred to herein.

748. Exemption from Local Taxation of Public Service Corporations.

So much of the property of public service corporations as is essential to the exercise of their corporate franchises is exempt from taxation, with exceptions hereinafter noted. Such public service corporations are railroad, canal and telegraph companies, natural and artificial gas companies, pipe-line companies, water companies, electric light companies, street railway and traction companies, etc. There is no statute law for the exemption from taxation of such property of such corporations, but the same results from judicial legislation beginning with Schuylkill Bridge *v.* Frailey, 13 S. & R., 422 (1825), and extending to the present time. An examination of these cases will be found in the writer's monograph, "Taxation of Public Service Corporations in Pennsylvania," (George T. Bisel Company, 1905), to which the learned reader is referred.

It is to be noted, however, that the exemption above referred

to does not extend to the exemption of public service corporations from liability to assessments for municipal improvements.[1]

749. What Property Is and What Is Not Essential to the Exercise of the Franchises of Public Service Corporations.

As stated in the preceding section the exemption from local taxation is confined to public service corporations, and to only so much of their property as is essential to the exercise of their franchises.

"It is not corporations, as such, that we have considered to be exempt from taxation, except so far as expressly imposed; but public works held by corporations, together with their necessary appurtenances as public works: 26 Pa., 245; 30 Pa., 232. Corporations for mere private purposes can claim no such exemption and their lands are taxable just as the lands of individuals are, unless expressly exempt." [2]

Although railroads are not within the scope of this work, an examination of what property has been held essential to the exercise of their franchises will be useful as throwing light upon what property of other public service corporations is and is not essential to the exercise of their franchises.

The following property of railroad companies has been held necessary to the exercise of their franchises, and hence exempt from local taxation:—

Depots, offices, oil-houses and car-houses.[3]

Engines and machinery for raising cars up inclined planes, and engine-houses.[4]

Machine shops used exclusively in repairing and restoring the cars and locomotives of the company, and not for original

(1) Phila. *v.* North Penna. R. R. Co., 16 Pa. C. C., 620 (1895); Phila. to Use *v.* Phila. & R. R. R. Co., 1 Pa. Super. Ct., 236 (1896).

(2) Carbon Iron Co. *v.* Carbon County, 39 Pa., 251 (1861); Lackawanna Iron & Coal Co. *v.* Luzerne County, 42 Pa., 424 (1862); Chester County *v.* Farmers' Market House Co., (No. 2), 1 Chest. Co., 428 (1882); Allegheny County *v.* McKeesport Diamond Market Co., 123 Pa., 164 (1889); South Reading Market House Co. *v.* Berks County, 11 W. N. C., 424 (1882); Columbia County *v.* Espy Lime & Cement Co., 1 C. P. Rep., 55 (1879); 11 Lanc. Bar., 124.

(3) Railroad Company *v.* Berks County, 6 Pa., 70 (1847).

(4) Wayne County *v.* D. L. & Hudson Canal Co., 15 Pa., 351 (1850).

construction, but if used for original construction they are subject to local taxation.[5]

It goes without saying that the rights of way, tracks, yards and rolling stock of railroad companies are essential to their operations and exempt from local taxation.

The property must be necessary to the transaction of the business of the company to be exempt, and not merely convenient to such use.

It has been held, therefore, that warehouses, coal yards, coal shutes, machine shops, for original construction, and wood yards, etc., are not essential to the operations of a railroad and that such property is subject to local taxation.[6] Boarding houses owned by railroad companies and used by their employes are taxable locally;[7] so is an office building, remote from the tracks of the company used by it as its general office,[8] and an ice plant consisting of houses, engines and machinery for storing ice harvested on lands owned by the company, used in refrigerating cars and ice coolers in passenger cars.[9]

Real estate situated in Pittsburg owned or possessed by any railroad company is subjected to taxation for city purposes by Sec. 3 of the Act of January 4, 1859, P. L., 828, and the offices, depots, car-houses and other real property of railroad companies situated in Philadelphia, the superstructure of the road and water stations only excepted, are made subject to city taxation by Sec. 1 of the Act of April 21, 1858, P. L., 385.

The liability of other public service corporations to local or municipal impositions will be treated of in the following sections.

750. Local Taxation of Street Railway Companies.

The tracks, turntables and cars of street railway companies are

(5) Western N. Y. & Penna. R. R. Co. *v.* Venango County, 183 Pa., 618 (1898); 5 Pa. Super. Ct., 304; overruling Berks County *v.* East Penna. R. R. Co., 1 Walker, 428. Lehigh Valley R. R. Co. *v.* Bradford County, 24 Pa. C. C., 537 (1901). See Penna. & N. Y. C. R. R. Co. *v.* Vandyke, 137 Pa., 249 (1890).

(6) Railroad Company *v.* Berks County, 6 Pa., 70 (1847); Western N. Y. & Penna. R. R. Co. *v.* Venango County, 5 Pa. Super. Ct., 304 (1897).

(7) Wayne County *v.* Del. & Hudson Canal Co., 15 Pa., 351 (1851).

(8) East Penna. R. R. Co.'s Case, 1 Walker, 428 (1863).

(9) Del., Lacka. & W. R. R. Co. *v.* Metzger, 28 Pa. Super. Ct., 239 (1905).

exempt from local taxation.[10] So are car stables,[11] and lands appurtenant thereto; and where lands taken as a whole are necessary to the exercise of the franchises of a street railway such land is exempt from taxation, although every part thereof may not be in actual use.[12]

It was originally held, that horses used in the traction of street railway cars were not exempt from taxation.[13] It is now held, however, that where the only motive power of a street railway company consists of horses, and it appears that all the horses of the company are used in moving its cars, such horses are not subject to municipal taxation, and it is immaterial that a few of them are used in hauling feed to the car stables, in making repairs to the tracks, etc.[14]

751. Local Taxation of Street Railway Companies in Philadelphia and Pittsburg.

A traction motor company which leases and operates street railways in Philadelphia is subject to the provisions of the Act of April 21, 1858, P. L., 385, which provides that "the offices, depots, car-houses and other real property of railway corporations situate in said city, the superstructure of the road and water stations alone excepted, are and hereafter shall be subject to taxation by ordinance for city purposes." [15]

But a power-house for the manufacture of electricity, owned and used by a traction motor company engaged in the operation of street railways is exempt from taxation under said act, the term, "real estate" used in said act not applying to such power-house.[16]

(10) People's St. Ry. Co. *v.* Scranton, 8 Pa. C. C., 633 (1883); Northampton County *v.* Easton Pass. Ry. Co., 148 Pa., 282 (1892).

(11) Northampton County *v.* Easton, S. E. & W. L. Pass. St. Ry. Co., 8 Pa. C. C., 442 (1890).

(12) Schuylkill Valley Traction Co. *v.* Moore, 19 Montg. Co., 119 (1903).

(13) People's St. Ry. Co. *v.* Scranton, 8 Pa. C. C., 633 (1890); Citizens' Pass. Ry. Co. *v.* Donohugh, 10 W. N. C., 62 (1881); Smith *v.* Phila. City Pass. Ry. Co., 12 W. N. C., 171 (1882); Wayne County *v.* D. & H. Canal Co., 15 Pa., 355 (1850); Delaware County *v.* Chester St. Ry. Co., 10 Pa. C. C., 326 (1891).

(14) People's Pass. Ry. Co. *v.* Taylor, 22 Pa. Super. Ct., 156 (1903); Northampton Co. *v.* Easton, S. E. & W. L. Pass. Ry. Co, 8 Pa. C. C., 442 (1890).

(15) Phila. *v.* Phila. Traction Co., 206 Pa., 35 (1903).

(16) Phila. *v.* Electric Traction Co., 208 Pa.. 156 (1904).

Street passenger railway companies are railroads within the meaning of the Act of January 4, 1859, P. L., 828, Sec. 3, making all real estate in Pittsburg owned or possessed by any railroad company subject to taxation for city purposes.[17] So are incline plane companies.[18]

752. Municipal Impositions on Street Railway Companies.

The Act of May 23, 1889, P. L., 277, relating to the incorporation of cities of the third class, authorizes a tax upon or in respect to each car operated by a street railway company, and not a tax upon the business or occupation in which the company is engaged. It is a tax, and not a license fee imposed under the police power. The act in question does not in this respect violate the constitutional provision as to uniformity of taxation. Where an ordinance imposing the tax provides a penalty for non-payment thereof, this does not exclude a proceeding by civil action to recover the amount of the tax.[19]

The tax will not be apportioned between two municipalities between which the cars run. It is due for each car run into the taxing municipality.[20]

In imposing the tax on street railway cars, the number of car trucks alone should be considered. The interchangeable car bodies not in use are merely auxiliary parts of cars in actual use.[21]

Where an ordinance provides for a specified tax per year on "each car running within the said borough," the tax may be collected on each car running having a separate number, whether or not such car run every day or for the whole of any particular day. Where a company refuses to state the number of cars operated, the municipality may offer in evidence proof that the tax imposed was based upon lists of the numbers of cars passing on three different days made by policemen.[22]

(17) Pennsylvania Railroad Co. *v.* Pittsburg, 104 Pa., 522 (1883); 14 W. N. C., 268, 333.

(18) St. Clair Incline Plane Co. *v.* Pittsburgh, 49 P. L. J., 190 (1901).

(19) Harrisburg *v.* East Harrisburg Pass. Ry. Co., 4 D. R., 683 (1895); Erie City *v.* Erie Electric Motor Co., 24 Pa. Super. Ct., 77 (1903).

(20) Harrisburg *v.* Citizens' Pass. Ry. Co., 4 D. R., 687 (1895).

(21) Erie City *v.* Erie Electric Motor Co., 24 Pa. Super. Ct., 77 (1903); *Contra* Harrisburg *v.* Citizens' Pass. Ry. Co., 4 D. R., 687 (1895).

(22) Braddock Borough *v.* Monongahela Street Ry. Co., 28 Pa. Super. Ct., 262 (1905).

In boroughs the tax upon street railway cars is imposed under the police power, the exercise of which power may not be bargained away by a municipality, and hence such license may be increased from time to time when the increase is reasonable and warranted by existing conditions.[23]

A specific condition in an ordinance of a borough granting permission to an electric street railway company to operate within its limits, which provides that the company shall pay to the borough a certain per cent. of its gross earnings from the operation of its line, both within and without the borough, is not ultra vires and will be enforced.[24]

A tax imposed by a city of the second class of twenty-five cents per foot "for each lineal foot of track laid, maintained or operated" by a street railway within the city, exclusive of such tracks as may be in its yards or buildings, is a property tax, and cannot be maintained as a license tax or fee under the Act of March 7, 1901, providing for the government of cities of that class, although in the ordinance imposing the same the tax is designated as a license tax.[25]

753. Local Taxation of Water Companies.

The lands of water companies on which their dams are located and lands abutting on streams from which the companies take water, necessary to prevent pollution of the same, are not locally taxable.[26] Nor the lands on which the companies' reservoirs are situated.[27]

Lands held by water companies to prevent contamination of their water supply and not occupied by their plants are subject to local taxation,[28] although it seems that if it were made to appear that it was absolutely necessary for the company to own such lands in order to maintain the purity of their water, and they de-

(23) Shenandoah Borough *v.* Schuylkill Traction Co., 27 Pa. C. C., 465 (1903).

(24) Carlisle Borough *v.* Cumberland Valley Elec. Pass. Ry. Co., 8 D. R., 497 (1899).

(25) Pittsburgh Railways Co. *v.* Pittsburgh, 211 Pa., 479 (1905).

(26) Roaring Creek Water Co. *v.* Northumberland County, 6 Pa. C. C. 473 (1889).

(27) Lehigh County *v.* Bethlehem South Gas & Water Co., 4 D. R., 723 (1895); Roaring Creek Water Co. *v.* Northumberland County, 6 Pa. C. C. 473 (1889).

(28) Roaring Creek Water Co. *v.* Girton, 142 Pa., 92 (1891).

rived no independent revenue from it through the sales of timber and other uses unrelated to their chartered purposes it might be exempt.[29]

754. Local Taxation of Electric Light, Heat and Power Companies.

Electric light, heat and power companies are exempt from local taxation on property essential to the exercise of their franchises.[30]

The fact that a portion of the property of an electric light and power company is reserved for use for its manufacturing purposes in case of an emergency or to meet the demands of increasing business, does not alter or change its character as being part of the premises used or intended to be used for its essential object. Such portion is still a part of a property which in its entirety is exempt from local taxation.[31]

755. Local Taxation of Natural Gas Companies.

A natural gas company organized under the Act of May 29, 1885, is a corporation engaged in a business of a public interest and is not locally taxable upon lands owned by it, where it appears that the gas in the land is necessary and indispensable to the company in carrying out the business purpose for which it was incorporated.[32]

Where an owner of land conveyed to a natural gas company all the gas in the land, the company cannot be taxed for the gas by the local authorities, where it appears that the same is indispensably necessary to carry out the public purposes for which the company was chartered.[33]

Natural gas companies are not locally taxable upon the pipe laid by them and used for the distribution of gas in the streets of a city, with municipal consent.[34]

(29) Spring Brook Water Co. *v.* Kelly, 17 Pa. Super. Ct., 347 (1901).

(30) Southern Elec. Lt. & Pr. Co. *v.* Phila., 191 Pa., 170 (1899); Scranton *v.* Scranton Elec. Lt., Ht. & Pr. Co., 8 Pa. C. C., 626 (1890); Lancaster *v.* Edison Illg. Co., Idem, 631; Brush Elec. Lt. Co. *v.* Phila., 8 D. R., 231 (1899).

(31) Southern Elec. & Pr. Co. *v.* Phila., 191 Pa., 170 (1899). See York *v.* Telephone Co., 20 York, 109 (1906).

(32) St. Mary's Gas Co. *v.* Elk County, 191 Pa., 458 (1899); 168 Pa., 401 (1895).

(33) Ridgway Light & Heat Co. *v.* Elk Co., et al., 191 Pa., 465 (1899).

(34) Pittsburg's Appeal, 123 Pa., 374 (1889); 23 W. N. C., 91.

756. Local Taxation of Artificial Gas Companies.

The works of an incorporated artificial gas company are not locally taxable as real estate, but dwelling houses erected by them for the residence and the accommodation of their workmen are locally taxable.[35]

An artificial gas company is not taxable by a city for any portion of a lot of real estate owned by it, where it appears that nearly half thereof is occupied by a gas plant, and the remainder is used for dumping refuse from the works, and for storage of material necessary for the transaction of the company's business, and that the company contemplates using such remaining portion to enlarge its plant.[35*]

757. Local Taxation of Telegraph and Telephone Companies.

The property of telegraph and telephone companies essential to the exercise of their franchises is not taxable locally, and a telephone company is not taxable by a city by reason of the fact that a reading room, two vacant rooms, a cellar and part of its lot are not in constant daily use.[36]

758. Local Taxation of Pipe Line Companies.

Property essential to the transaction of the business of a pipe line company is exempt from local taxation.[37]

But oil tanks belonging to a pipe line company, used for storage purposes, are taxable.[38]

759. Municipal Impositions on Corporations.

The subjects of county, school, road and poor taxes, as hereinbefore enumerated, are subject to taxation for municipal purposes. In addition, certain other objects are subjected by law to taxation for such purposes. Public service corporations are, of course, exempt from taxation for municipal purposes on so much of their property as is essential to the exercise of their franchises, with the exceptions above noted in Pittsburg and Philadelphia,

(35) West Chester Gas Co. *v.* Chester County, 30 Pa., 232 (1858); Coatesville Gas Co. *v.* Chester County, 97 Pa., 476 (1881); Schuylkill County *v.* Citizens' Gas Co., 148 Pa., 162 (1892).

(35*) Pittsburgh *v.* Consol. Gas Co., 34 Pa. Super. Ct., 234 (1907).

(36) York *v.* Telephone Co., 20 York, 109 (1906).

(37) Mellon Pipe Lines *v.* Allegheny County, 3 D. R., 448 (1894).

(38) United Pipe Lines *v.* Venango County, 27 Pitts. L. J., 17 (1879).

as well as from taxation on such property for county and other local purposes. They are not, however, exempt from the additional municipal impositions hereinafter referred to.

In cities of the first class, of which Philadelphia is the only example, there seems to be no law under which corporations may be subjected to special municipal impositions, except in the exercise of the general police power. Under that power, however, a reasonable annual license fee may be imposed upon street railway cars.[39] In addition, the charters of numerous street railway companies, incorporated under special acts, operating in that city, provide that they shall pay certain amounts to the city whenever the dividends on their capital stock are in excess of certain amounts. Pole and wire taxes are collected from telephone and telegraph companies, but these are, of course, imposed under the police power.

In cities of the second class, license taxes for general revenue purposes may be imposed under Paragraphs 4 and 22 of Sec. 3 of the Act of March 7, 1901, P. L., 41, which are as follows:

"IV. Every city of the second class shall have power for general revenue purposes to levy and collect a license tax to be fixed by ordinance upon street railways, hack-drivers, auctioneers, and all and every corporation, company or individual doing business in said city, payable annually and to regulate the collection of the same."

"XXII. And every city of the second class shall have power for general revenue purposes to levy and collect license taxes or fees to be fixed by ordinance upon street railways, hack-drivers, auctioneers, bill-posters, public halls, or dances, night soilers, garbage collectors, railroad switches, pawn-brokers, peddlers, vendors of any kind of merchandise whatever using the streets, lanes, highways, wharves or public squares or grounds for the purpose of vending the same; all theatrical exhibitions whether permanent or transient, including circuses, vehicles, bicycles, tricycles, automobiles, dogs, ball games or ball parks, and all other matters and things of a like nature, and to regulate the collection of the same and to provide penalties for default therein."

Under these provisions it is held that a city of the second class may not impose a tax of twenty-five cents per foot "for every lineal foot of track laid or maintained or operated," by a street

(39) Johnson *v.* Phila., 60 Pa., 445 (1869).

railway within the city, and so much per lineal foot of the pipe laid by a gas company, or wires or conduits of electric light, telegraph and telephone companies, such tax being a property tax and not a license tax within the meaning of said provisions, although the ordinance imposing the tax designated the same as a license tax.[40]

It seems, further, that a tax on the gross receipts of electric light and other public service corporations may not be imposed in cities of the second class under the said provisions of the Act of 1901.[41]

760. Municipal Impositions in Cities of the Third Class.

Sec. 6 of the Act of May 16, 1901, P. L., 228, relating to cities of the third class provides that such cities shall have power:

"To levy and collect a license tax not exceeding one hundred dollars each annually on all . . . . street railway cars and other vehicles used in the city for hire or pay . . . . life or other insurance companies, market-house companies, express companies or agencies, telegraph, telephone, steam-heating, gas, natural gas, water, electric light or power companies, or agencies . . . ."

The foregoing section amends Art. V, Sec. 3, Cl. IV, of the Act of May 23, 1889, P. L., 287. The clause as originally enacted in the Act of 1889, provided, that the tax should be levied and collected "for general revenue purposes," and it was held that the tax collected thereunder was a tax in a general sense and was not levied under the police power of the city.[42]

It has not been decided since the amendment of 1901 whether the omission therefrom of the words "for general revenue purposes" makes the taxes imposed under the amended clause a license fee imposed under the police power.

761. Impositions Upon Corporations in Boroughs.

No authority is expressly granted by law to impose any special imposition on corporations in boroughs, but boroughs have under their police power the right to impose a license upon each street

(40) Pittsburg Railways Co. *v.* Pittsburg, 211 Pa., 479 (1905).

(41) Scranton City *v.* Scranton Lt. & Ht. Co., 33 Pa. Super. Ct., 431 (1907).

(42) Williamsport *v.* Wenner, 172 Pa., 173 (1896); Oil City *v.* Oil City Trust Co., 151 Pa., 454 (1892).

car operated within their limits,[43] upon the poles and wires of telephone, telegraph and electric light companies (which subject will be separately considered hereinafter) and generally upon public service corporations.

762. Municipal Exactions from Corporations in Consideration of the Grant of the Right to Construct and Operate Public Service Corporations Within Municipalities.

In addition to the impositions which municipalities may place upon corporations operating within their limits, either for purposes of revenue or in the exercise of their police power, such municipalities may, where the law requires that corporations of a given kind shall secure municipal consent before beginning their operations within a municipality, require such corporations in consideration of the grant of said privilege to pay such amounts and in such manner as may be mutually agreed upon.[44]

Where, however, as in the case of natural gas and water companies, the acts providing for the incorporation of a class of corporations, provide that corporations of such class may enter upon the streets of a municipality subject to such regulations as the city authorities may prescribe, "the city's legislative power is limited and does not extend to any conditions to be attached to its consent, except such as are reasonable regulations of the mode of carrying out the statutory powers of the corporation."[45]

Such payment may, therefore, be exacted for the privilege of doing business within a municipality from street railway companies, telephone, telegraph, electric light, heat and power and pipe line companies, but not from natural gas companies,[47] nor from artificial gas and water companies.

763. Pole and Wire Licenses in Municipalities.

The right of municipalities to supervise and control the erection and maintenance of telegraph, telephone, electric light and street railway poles and wires within their limits through the exercise of the police power, and for that purpose to impose a reason-

(43) Shenandoah Boro. *v.* Schuylkill Traction Co., 27 Pa. C. C., 465 (1903).

(44) Allegheny *v.* Millville, E. & S. St. Ry. Co., 159 Pa., 411 (1893).

(45) Pittsburg's Appeal, 115 Pa., 4 (1886); as distinguished in Allegheny *v.* Millville, E. & S. St. Ry. Co., 159 Pa., 411 (1893).

(47) Pittsburg's Appeal, 115 Pa., 4 (1886).

able license fee for each pole and mile of wire, has always been recognized in Pennsylvania, but what constituted a reasonable license fee in such cases was variously decided. The earlier cases held that the elements that entered into the reasonableness of the fee were the necessary expense incident to the issuing of the license, the probable expense of inspection, regulation, etc., and the possible liability of the city for accidents resulting from negligence in the care of the poles and wires. The measure of reasonableness of the charge was held not to be the amount expended for a given year.[48]

The law now is, as laid down by the United States Supreme Court, however, that the amount of pole and wire licenses must be limited to the amount necessary to reimburse the municipality for expenditures made in the inspection and regulation of the poles and wires, and such other expenses as it may be reasonably anticipated will have to be borne by it in connection therewith. The liability to pay for injuries which might arise from the bad condition of the poles and wires resulting from the neglect of the company to inspect and supervise the same is not a liability which the municipality is entitled to recover from the company in advance of its happening.[49]

Any pole or wire license fee, therefore, ordained by a municipality in excess of that required for police supervision is unreasonable and its collection cannot be enforced.[50]

The decisions of the Supreme Court of the United States led to the passage of the following Act of 1905:

764. Courts of Common Pleas to Decide Whether Pole and Wire Licenses Are Reasonable.

Whenever hereafter any dispute shall arise between any township, city, borough, or other municipal corporation of this State,

(48) Taylor Boro. *v.* Postal Tel. Cable Co., 202 Pa., 583 (1902); Schellsburg *v.* W. U. Tel. Co., 26 Pa. Super. Ct., 343 (1904). See New Hope Boro. *v.* W. U. Tel. Co., 16 Pa. Super. Ct., 306 (1901); New Hope Boro. *v.* Postal Tel. Co., 202 Pa., 532 (1902); W. U. Tel. Co. *v.* Phila., 22 W. N. C., 39 (1888).

(49) Postal Tel. Co. *v.* Taylor, 192 U. S., 64 (1905); Atlantic & Pacific Tel. Co. *v.* Phila., 190 U. S., 160 (1903); W. U. Tel. Co. *v.* New Hope, 187 U. S., 419.

(50) United Teleph. & Tel. Co.'s Pt., 15 D. R., 193 (1905); 31 Pa. C. C., 481.

having authority under the law to charge a license fee against any telegraph, telephone, or light, or power company, occupying the highways of said municipality with its poles, wires, conduits or cables, as to whether or not the amount of license fee named in any ordinance of said municipal corporation, for the inspection and regulation of the said poles, wires, conduits, or cables under its police powers, is or is not reasonable, either party may apply by petition to the Court of Common Pleas of the county where said municipal corporation is situated, to determine the said dispute. Upon the filing of said petition, setting forth the nature and character of the dispute, and the facts bearing upon the question thus raised, the said court shall issue a citation to the respondent, commanding it to appear and answer the said petition at a time named, and to abide by and obey the order of the court. Said citation and a copy of said petition shall be served upon the respondent, not less than fifteen days before the time fixed for answering. To said petition the respondent shall make answer within the time fixed or such extension thereof as the court shall allow, specifically answering the facts set forth in said petition, and averring such other or further facts as it shall deem necessary for the proper determination of the said dispute. At any time after the return day fixed in the said citation, the said court shall, upon application of either party, fix a date for the hearing of the issue raised by said petition and answer; and thereupon shall take the evidence, and decide the said dispute in the way and manner provided by law for the hearing of cases in equity.[51]

765. Pleadings and Practice.

Said court shall have power to allow any pleading to be amended, to make all necessary, general or special rules or orders for the production of evidence and to expedite the said hearing, and may hear and determine the matter ex parte if the respondent fails to answer or appear at the time fixed for the hearing.[52]

766. Court to Determine the Amount of License Fee.

The said court, in its decision of said dispute, shall determine the amount of annual license fees which should be paid to the

(51) Sec. 1, Act April 17, 1905, P. L., 183. The constitutionality of this act is doubted in Washington Boro. *v.* Western U. Teleg. Co., 33 Pa. C. C., 161 (1907).

(52) Sec. 2, Act April 17, 1905, P. L., 183.

said municipal corporation in order to properly compensate it for the necessary cost of the services performed, or to be performed, by it, for the inspection and regulation of the poles, wires, conduits, or cables of the said telegraph, telephone, light, or power company; and the amount thus determined shall be the maximum sum which the said municipal corporation shall be authorized to charge as license fees against such petitioning corporation.[53]

767. Appeals.

Either party shall have the right of appeal from the order of the court, to the Supreme or Superior Court, as in other cases.[54]

768. Fee to Continue Until Altered by Court.

The amount of such annual license fees, as determined by the final order of the court, shall continue until altered by the court itself; but no application shall be made for that purpose oftener than once in every two years.[55]

769. Companies Not to Be Relieved from Liability for Negligence.

Nothing in this act contained shall be so construed as to alter or affect the duty of said telegraph, telephone, light, or power company to properly erect, or construct and maintain, its poles, wires, conduits, and cables, or to relieve it from liability for negligence in regard thereto either primarily to the person injured, or secondarily to the municipal corporation, if judgment be recovered against it by the person injured by reason of such negligence.[56]

770. Decisions as to Pole and Wire License Fees.

The Act of April 17, 1905, P. L., 183, is constitutional and applies as well to disputes existing between a company and a municipality as to what amounts are due and unpaid under an existing ordinance, as to what shall be paid as a license fee in the future. The act itself specifies what matters are to be taken into consideration in fixing the amount of the license fees.[56*]

(53) Sec. 3, Act April 17, 1905, P. L., 183.
(54) Sec. 4, Act April 17, 1905, P. L., 183.
(55) Sec. 5, Act April 17, 1905, P. L., 183.
(56) Sec. 6, Act April 17, 1905, P. L., 183.
(56*) Penna. Teleph. Co. *v.* South Bethlehem Boro., 16 D. R., 878 (1907). The constitutionality of the act is doubted, however, in Washington Boro. *v.* W. U. Teleg. Co., 33 Pa. C. C., 161 (1907).

In an action to recover the amount of pole and wire licenses, a telegraph company may show that the municipality made no inspection of its poles and wires and incurred no expense for that purpose, and that the license fee is disproportionate to the actual cost of a proper inspection,[57] but in an action to recover such fees an affidavit of defense is insufficient which merely avers that the amount of the license fee "is not based upon the cost of supervision or expense incurred thereby," without setting forth any facts upon which such conclusion is based.[58]

An affidavit of defense is sufficient to prevent judgment, however, which avers that the tax was not based upon the cost of inspection, and was more than twenty times the amount actually expended or which could have been expended for that purpose.[59]

The determination of the reasonableness of the amount of pole and wire license fees is, in the first instance, in the municipal authorities. Courts will not interfere unless the unreasonableness of the same is such as to indicate an abuse of discretion.[60]

Under the Act of April 17, 1905, P. L., 183, a court will not declare a pole license fee void, unless it is so unreasonable as to show abuse of discretion by the borough authorities. A borough may not collect license fees when it appears that no inspection has been made during the time for which the fees are required to be paid.[60*]

A borough may impose a license tax for the inspection of telegraph and telephone poles and wires although such poles and wires are located on a road owned by a turnpike company.[61]

The license tax on poles and wires being imposed under the police power, a telegraph company is not relieved from the payment of the same by an ordinance exempting it from all taxation and special assessments in the nature of taxation.[62]

(57) Norwood Boro. *v.* W. U. Tel. Co., 25 Pa. Super. Ct., 406 (1904); Schellsburg *v.* W. U. Tel. Co., 26 Pa. Super. Ct., 343 (1904). See Kattanning Boro. *v.* W. U. Tel. Co., 26 Pa. Super. Ct., 346 (1904).

(58) West Conshohocken Boro. *v.* Conshohocken Elec. Lt. & Pr. Co., 29 Pa. Super. Ct., 7 (1905).

(59) Collingdale Boro. *v.* Keystone State Teleph. & Tel Co., 33 Pa. Super. Ct., 351 (1907).

(60) Washington Boro. *v.* W. U. Tel. Co., 33 Pa. C. C., 161 (1907).

(60*) Washington Boro. *v.* W. U. Tel. Co., 16 D. R., 847 (1907).

(61) Norwood Boro. *v.* W. U. Tel. Co., 25 Pa. Super. Ct., 406 (1904).

(62) Braddock Boro. *v.* Allegheny County Teleph. Co., 25 Pa. Super. Ct., 544 (1904).

In a proceeding held under the Act of March 17, 1905, supra, it was held that a license fee of ten cents per pole was a reasonable and proper fee in the borough of Carlisle.[63]

771. Mercantile and Other License Taxes.

The Act of May 2, 1899, P. L., 184, imposes upon each retail vendor of or retail dealer in goods, wares or merchandise an annual mercantile tax of $2.00, and one mill additional on each dollar of the whole volume, gross of business transacted annually. Wholesale vendors of or dealers in goods, wares or merchandise are required by the same act to pay a mercantile license tax of $3.00 and one-half mill additional on each dollar of the whole volume, gross, of the business transacted annually, and dealers in or vendors of goods, wares or merchandise at any exchange or board of trade are required to pay a mercantile license tax of twenty-five cents on each thousand dollars' worth, gross, of goods sold.

The mercantile license tax is a tax on business, and corporations engaged in the vending of or dealing in goods, wares or merchandise are subject thereto like individuals,[64] notwithstanding that they pay a tax upon their capital stock or a bonus, or that they are authorized by their charters to manufacture goods of like nature to that which they sell; and a foreign corporation engaged in the mercantile business is subject to the tax the same as domestic companies;[65] but foreign corporations having no factory, warehouse or other place of business in Pennsylvania, but making sales only through agents and traveling salesmen who take orders which are filled without the State are not subject to the tax.[66]

Of course corporations are entitled to the same exemptions as individuals. Hence, corporations selling nothing but their own products and those only at the place of manufacture are not liable

(63) United Teleph. & Tel. Co.'s Pt., 31 Pa. C. C., 481 (1905); 15 D. R., 193.

(64) Com. *v.* Thomas Potter, Sons & Co., 159 Pa., 583 (1894); Com. *v.* Bailey, Banks & Biddle Co., 20 Pa. Super. Ct., 210 (1902).

(65) Com. *v.* H. G. Tombler Grocery Co., 6 D. R., 8 (1896); Com. *v.* Swift & Co., 19 Pa. C. C., 572 (1897); Wyoming County *v.* Stark, 12 D. R., 378 (1903); Potter *v.* Warder, Bushnell & Glessner Company, 28 Pa. C. C., 183 (1903).

(66) Com. *v.* American Tobacco Co., 173 Pa., 531 (1896).

to the tax.[66*] But they are subject to the tax if they sell such product from a store or warehouse distinct from their manufacturing establishment.[66**]

Numerous other license taxes for State and local purposes exist in Pennsylvania, and corporations are subject to the payment of these equally with individuals, if they engage in the businesses to which such license taxes relate, respectively.

A municipality may impose a tax on the domestic business of an express company, notwithstanding the fact that the principal business of the company is interstate business.[67]

772. Taxation of Corporations Incorporated Under Special Acts—Exemptions.

Prior to the adoption of the Constitution of 1874, corporations were generally incorporated under the provisions of special acts, which acts frequently contained provisions, either providing the manner in which they should be taxed or exempting them from the payment of certain taxes.

Where these exemptions were granted for a consideration, and not as a mere gratuity, it has been held, subject to the exceptions to be hereafter stated, that such exemptions formed a part of the contract between the Commonwealth and the corporations, and that such corporations could not be subjected to the taxes from which they were thus relieved, either by general legislation or by acts specifically repealing such exemptions.

This is true, however, only in cases where the Commonwealth had not reserved to itself the right to alter, amend or annul the charters of corporations.

The twenty-fifth section of Art. 1 of the Constitution of 1838 provided that bank charters should contain a clause reserving to the Legislature the power to alter, revoke or annul the same, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth.

The fifty-third section of the General Banking Law of April 16, 1850, reserves the power to alter and revoke bank charters in the very terms of the foregoing constitutional provision.

(66*) Com. *v.* Crum Lynne I. & S. Co., 27 Pa. Super. Ct., 508 (1905).

(66**) Mercantile Tax Law of 1889. Op. Atty. Gen., 23 Pa. C. C., 369 (1900). For decisions relative to the mercantile license tax generally, see Stewart's Purdon's Digest, notes to pages 2516, et seq.

(67) Titusville *v.* American Express Co., 32 Pa. C. C., 361 (1906).

The amendment of 1857 to the Constitution has a similar provision applicable to the charters of all corporations formed after the adoption of such amendment, and the tenth section of Art. 16 of the Constitution of 1874 provides that "the General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, revocable at the time of the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this Commonwealth," etc.

The Railroad Act of February 19, 1849, provides that the "Legislature hereby reserves the power to resume, alter or amend any charter granted under this act."

It has been held, that a General Revenue Act subjecting a corporation formed under a special act to a different rate of taxation than that provided for in its charter, or taxing the class of corporations to which it belongs, constitutes an amendment of its charter within the meaning of the foregoing provisions, and subjects the corporation to taxation at the new rate, or repeals the exemption provided in its charter.

"Another point may be taken. It may be said that the Act of 1859 neither alters, revokes nor annuls the charter, and, therefore is not within the purview of this clause of our State Constitution. Does it not 'alter' the charter? That is the very complaint that is urged. If the charter says the bank shall pay no taxes but State taxes, and the Act of 1859 says it shall pay city taxes also, I think it is quite clear that the charter is altered. We are accustomed to speak of all the incorporating acts as constituting the charter, which is not strictly correct language, though accurate enough for all practical purposes. The Constitution used the word charter in its loose and popular sense rather than in its strictest signification. We regard then, the General Banking Law of 1850 and its supplements as entering into and forming part of the charter of this bank, within the meaning of the word charter as used in our State Constitution—and we look upon the Act of 1859, as altering that charter. . . . ."[68]

Exemptions from taxation provided for in special acts of incorporation may, therefore, be repealed by subsequent revenue acts imposing taxes upon corporations of the classes to which such

(68) Iron City Bank *v.* City of Pitts., 37 Pa., 340 (1860).

specially incorporated corporations belong, respectively, in the following cases:

1. Where there was no consideration for such grant of exemption.[69]

2. In the case of corporations the acts incorporating which specifically reserve to the Legislature the right to alter, annul or amend such charters.[70]

3. In the case of banks incorporated since the adoption of the Constitution of 1838.[71]

4. In the case of railroad companies incorporated subject to the provisions of the Railroad Act of 1849.[72]

5. In the case of corporations of all kinds incorporated since the adoption of the Constitutional amendment of 1857.[73]

Where, however, the exemption was granted for a sufficient consideration and the right to alter, annul or amend the charter was not reserved either in the act of incorporation or in a general act of assembly to which the corporation was subject at the time of its formation, or by a Constitutional provision in force at such time, such exemption is binding upon the Commonwealth and may not be repealed, either specifically or by the provisions of a subsequent revenue law applicable to the class of corporations to which such corporation may belong.[74]

The general language of the Revenue Act of 1879 imposing a tax upon capital stock, repealed the express exemption granted to building and loan associations by the Act of April 10, 1879, P. L., 16.[75]

The proviso to Sec. 1, Act of April 6, 1870, P. L., 52, imposing a tax on rafting logs, provided that companies paying a tax should be "exempted from the provisions of existing Acts of Assembly imposing taxes on them for State purposes." Held,

(69) Phila. *v.* Penna. Hospital, 134 Pa., 171 (1890).

(70) Union Improvement Co. *v.* Com., 69 Pa., 140 (1871).

(71) Com. *v.* Easton Bank, 10 Pa., 442 (1849); Iron City Bank *v.* Pitts., 37 Pa., 340 (1860).

(72) Com. *v.* Fayette County R. R. Co., 55 Pa., 452 (1867).

(73) Wagner Free Institute *v.* Phila., 132 Pa., 612 (1890); Jones, etc. Mfg. Co. *v.* Com., 69 Pa., 137 (1871).

(74) Com. *v.* Phila. & Erie R. R. Co., 164 Pa., 252 (1894); Com. *v* Pottsville Water Co., 94 Pa., 516 (1880).

(75) Bourguignon Bldg. Assn. *v.* Com., 98 Pa., 54 (1881).

that such companies were not exempt from the capital stock tax imposed by the General Revenue Acts of 1874, 1877 and 1879.[76]

773. The Constitution of 1874 Does Not Repeal Exemptions from Taxation Granted to Corporations by Special Acts.

The provision in Sec. 1, Art. 9 of the Constitution of 1874 that "all taxes shall be uniform on the same classes of subjects" and levied under "general laws" does not operate to repeal special and local laws relating to taxation in force at the time of the adoption of such Constitution. It is mandatory upon the Legislature to enact laws framed upon its special intent and to repeal all laws inconsistent with it, but until the Legislature acts, such prior, special and local laws remain in force.[77]

The proviso to the Act of May 14, 1874, P. L., 158, providing that all property not exempted by the preceding portion of the act shall be subject to taxation, is not supported by the title, and is therefore void, and does not subject to taxation any property not specifically subjected thereto by other legislation, and the provision in the Constitution of 1874 that all property, with certain specific exceptions, shall be taxed, does not subject the property of quasi public corporations, essential to the exercise of their franchises, to local taxation.[78]

(76) Susquehanna Boom Co. *v.* Com., 14 W. N. C., 65 (1894).

(77) Lehigh Iron Co. *v.* Lower Macungie Township, 81 Pa., 482 (1876).

(78) Sewickley Boro. *v.* Sholes, 118 Pa., 165 (1888); Coatesville Gas Co. *v.* Chester County, 97 Pa., 476 (1881); West Manayunk Gas Lt. Co., 3 D. R., 52 (1893). *Contra.* Londonderry Township *v.* Burger, 2 Pears., 230 (1875).

CHAPTER XXXII.

TAXATION OF CORPORATIONS FOR STATE PURPOSES.*

774. Liability of Corporations to the Payment of the State Tax on Moneyed Capital.
775. Corporations Paying a Capital Stock Tax Exempted from the Tax on Moneyed Capital.
776. Enumeration of State Taxes on Corporations.

BONUS.

777. Bonus on Capital Stock of Domestic Corporations.
778. Bonus is Payable upon Actual Increases of Capital Stock.
779. Bonus on Foreign Corporations Having Capital Invested in Pennsylvania.
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*This chapter is an abridgment, corrected to date of publication, of the First Part of the writer's work, "Taxation for State Purposes in Pennsylvania."

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774. Liability of Corporations to the Payment of the State Tax on Moneyed Capital.

From and after the passage of this act all personal property of the classes hereinafter enumerated, owned, held, or possessed by any person, persons, copartnership, or unincorporated association or company, resident, located or liable to taxation within this Commonwealth, or by any joint-stock company or association, limited partnership, bank, or corporation whatsoever formed, erected, or incorporated by, under or in pursuance of any law of this Commonwealth, or of the United States, or of any other State or government, and liable to taxation within this Commonwealth, whether such personal property be owned, held, or possessed by such person or persons, copartnership, unincorporated association, company, joint-stock company or association, limited partnership, bank, or corporation, in his, her, their, or its own right, or as active trustee, agent, attorney in fact, or in any other capacity for the use, benefit or advantage of any other person, persons, copartnership, unincorporated association, company, joint-stock company, or association, limited partnership, bank, or corporation, is hereby made taxable annually for State purposes at the rate of four mills on each dollar of the value thereof, and no failure to assess or return the same shall discharge such owner or holder thereof from liability therefor to the Commonwealth, that is to say:

All mortgages, all moneys owing by solvent debtors whether by promissory note, or penal or single bill, bond or judgment; all articles of agreement and accounts bearing interest; all public loans whatsoever, except those issued by this Commonwealth or the United States; all loans issued by or shares of stock in any bank, corporation, association, company or limited partnership, created or formed under the laws of this Commonwealth or of the United States, or of any other State or government, including car trust securities and loans secured by bonds or any other form of certificate or evidence of indebtedness, whether the interest be included in the principal of the obligation or payable by the terms thereof, except shares of stock in any corporation or limited partnership liable to the capital stock tax imposed by the twenty-first section of this act, or relieved from the payment of tax on capital stock by said section; all moneys loaned or invested in other States, Territories, the District of Columbia, or foreign countries; all other moneyed capital in the hands of individual citizens of the State:

Provided, That this section shall not apply to bank notes, or notes discounted or negotiated by any bank or banking institution, savings institution or trust company: *And Provided,* That the provisions of this act shall not apply to building and loan associations: *Provided also,* That this section shall take effect on the first of January, Anno Domini one thousand eight hundred and ninety-two.[1]

775. Corporations Paying a Capital Stock Tax Exempted from the Tax on Moneyed Capital.

. . . . *Provided also,* That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock under this section, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them, and in which the whole body of stockholders or members as such, have the entire equitable interest in remainder; but corporations, limited partnerships, and joint stock associations, owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders, or members thereof, as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them as in the case of individuals:[2-6]

The reason for the exemption from taxation of the bonds, mortgages, etc., held by corporations, in their own right, paying a capital-stock tax is, that such securities enter into the value of their capital stock on which they are taxed directly by the State, and to tax such securities separately in the hands of the corporation would constitute double taxation.

Corporations paying a capital stock tax therefore, will not return to the local assessors the mortgages, bonds and other securities owned by them, in which the whole body of stockholders, or members as such, have the entire equitable interest in remainder, but they will return such securities held or owned by them as trustees, executors, administrators, guardians or in any other manner than for the whole body of stockholders, or members thereof, as sole equitable owners in remainder.

(1) Sec. 1, Act June 8, 1891, P. L., 229, amending Sec. 1, Act June 1, 1889, P. L., 420.

(2-6) Sec. 1, Act of June 7, 1907, P. L., 430, amending Sec. 5, Act of June 8, 1893, which amended Sec. 21, Act of June 1, 1889, P. L., 420. It will be noted that the title to the said Act of 1907 is totally defective.

Although manufacturing corporations are exempted from taxation on so much of their capital stock as is invested in and actually and exclusively employed in carrying on manufacturing within the State, they are taxable on so much of their capital as is invested in property not so invested and employed, and are consequently taxed on their capital which is invested in bonds, mortgages and other property of the classes of the kinds enumerated in the Act of June 8, 1891, supra. Manufacturing corporations, therefore, like other corporations subject to the payment of the tax on capital stock will make returns of mortgages, bonds, etc., to the local assessors only as indicated in the preceding paragraph.

As to the liability of banks to the State tax on personal property see Sec. 824.

STATE TAXATION OF CORPORATIONS.

776. Enumeration of State Taxes on Corporations.

Corporations are subject to the following State taxes or charges in Pennsylvania:

1. Bonus on charters.
2. Tax on capital stock of corporations, or interests in limited partnership and joint-stock associations.
3. Tax on corporate loans.
4. Tax on gross receipts of transportation, transmission, and electric light companies.
5. Tax on the stock of banks and trust companies.
6. Tax on the gross premiums of domestic insurance companies having capital stock, and on the premiums of foreign insurance companies.
7. Tax on net earnings, or income, of brokers, private bankers, and unincorporated banks and savings institutions without capital stock.
8. Tax on matured stock of building and loan associations.

BONUS ON CHARTERS.

777. Bonus on Capital Stock of Domestic Corporations—"Organization Tax."

All corporations hereafter created under any general or special law of this Commonwealth, except building and loan associations, and excepting all corporations named in the first class of section two of an act, entitled "An act to provide for the incorporation

and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one per centum upon the amount of the capital stock which said company is authorized to have, and a like bonus on any subsequent authorized increase thereof, and a like bonus shall be paid by all such companies heretofore incorporated upon any increase of their capital stock hereafter authorized. And no company as aforesaid shall have or exercise any corporate powers until the said bonus is paid, and the Governor shall not issue letters patent to any company until he is satisfied that the said bonus has been paid to the State Treasurer. And no company incorporated as aforesaid shall go into operation, or exercise any corporate powers or privileges, until said bonus has been paid. The Secretary of the Commonwealth shall not permit the filing in his office of any proceedings for increase of capital stock until he is satisfied that the said bonus upon said authorized increase has been paid to the State Treasurer.[7]

778. Bonus Is Payable upon Actual Increases of Capital Stock.

. . . . Upon the actual increase of the capital stock or indebtedness of such corporation, made pursuant thereto, it shall be the duty of the president or treasurer of such corporation, within thirty days thereafter, to make a return to the Secretary of the Commonwealth, under oath, of the amount of such increase actually made, and concurrently therewith such corporation shall pay to the State Treasurer, for the use of the Commonwealth, such bonus on the actual increase shown by said return as shall then be prescribed by law. . . . .[8]

So, where a corporation, incorporated prior to the passage of the Act of May 1, 1868, P. L., 108, Sec. 15, is subsequently to said date authorized to increase its capital stock from time to time, by

(7) Sec. 1, Act May 3, 1899, P. L., 189. This act extends and supersedes the Act of June 15, 1897, P. L., 155, which related only to corporations formed under or accepting the provisions of the Act of April 29, 1874, P. L., 73.

(8) Sec. 3, Act February 9, 1901, P. L., 5. This provision evidently repeals the Act of May 7, 1889, P. L., 115, which made bonus payable upon the *authorized* amounts of increases of capital stock, instead of upon the *actual* amounts thereof.

vote of the stockholders, to an amount not exceeding a certain sum, bonus may not be imposed upon a sum greater than the increase actually authorized and issued.8*

779. Bonus on Foreign Corporations Having Capital Employed in Pennsylvania or Their Principal Office Located Therein.

From and after the passage of this act all corporations, limited partnerships or joint-stock associations, except foreign insurance companies, chartered or created by or under the laws of any other State, or of the United States, or of any foreign country, whose principal office or chief place of business is located in this Commonwealth, or which have any part of their capital actually employed wholly within this State, in addition to complying with the laws now in force as to such corporations, limited partnership or joint-stock associations, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one per centum upon the amount of their capital actually employed or to be employed wholly within the State of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed.9

In addition to the duty of complying with the other laws now in force, no corporation, limited partnership or joint-stock association liable to pay bonus under this act shall go into operation or transact any business in this Commonwealth without having first made a report under oath to the Auditor General stating, specifically:

First. The State or country in which incorporated or created.

Second. The date of incorporation or organization.

Third. The location of its chief office in this State.

Fourth. The name and address of its president and treasurer.

Fifth. The amount of its bonded indebtedness.

Sixth. The amount of its authorized capital stock.

Seventh. The amount of capital stock paid in.

Eighth. The amount of capital employed wholly in the State of Pennsylvania.

And each of said corporations, limited partnerships or joint-stock associations, shall make a similar report annually thereafter, not later than the thirtieth day of November of each year.10

(8*) Com. *v.* Provident Life & Trust Co. of Phila., 12 D. R., 516 (1903); 6 Dau. Co., 109.

(9) Sec. 1, Act May 8, 1901, P. L., 150.

(10) Sec. 2, Act May 8, 1901, P. L., 150.

The Auditor General and State Treasurer are hereby authorized to settle, in the usual manner and have collected, an account against any corporation, limited partnership or joint-stock association violating the provisions of this act, with a penalty of fifty per centum for failure to make report and pay said bonus.[11]

The foregoing act applies only to capital of foreign corporations invested within the State after May 8, 1901, the date of the passage of the act. Com. *v.* Danville Bessemer Co., 207 Pa., 302 (1903); Com. *v.* Crucible Steel Co. of America, 7 Dau. Co. Rep., 20 (1904).

The Auditor General's Department contends that foreign corporations having capital invested in Pennsylvania prior to said date are subject to bonus thereon unless they had registered in said department and made all reports due on May 8, 1901. This question is now pending on appeal to the Court of Common Pleas of Dauphin county.

A foreign corporation doing business in Pennsylvania is not subject to the payment of bonus on so much of its capital as is invested in the shares of stock of a Pennsylvania corporation which has paid bonus on its capital. Com. *v.* D. B. Martin, 6 Dau. Co. Rep., 97 (1903); Com. *v.* Lycoming Imp. Co., *Id.*, 103; Com. *v.* Crucible Steel Co. of America, 7 Dau. Co. Rep., 20 (1904).

780. Bonus on Limited Partnership Associations.

Any partnership association formed under the provisions of an act, entitled "An act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," approved the second day of June, Anno Domini one thousand eight hundred and seventy-four, and any partnership formed under the provisions of an act, entitled "An act authorizing the formation of partnerships in which one or more, or all of the partners, may limit their liability for the debts of the partnership to the amount of capital subscribed by such partner or partners, respectively, and providing penalties for viola-

(11) Sec. 3, Act May 8, 1901, P. L., 150. The bonus imposed upon foreign corporations by this act is the same kind of an imposition as is known in the State of New York as a "License Tax on Foreign Corporations." See Sec. 181, The Tax Law of New York (Chapter 24, General Laws). New York Annotated Tax Laws, Cummings & Gilbert, Second Edition, p. 243.

tion of its provisions," approved the ninth day of May, Anno Domini one thousand eight hundred and ninety-nine, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-third of one per centum upon the amount of capital stock which said company or companies shall have at the time of formation of such partnership, and a like bonus on any subsequent increase thereof, and no company formed under the provisions of said acts shall go into operation or exercise any privileges until said bonus has been paid.[13]

No article of association, forming a partnership association under either of the acts aforesaid, or any amendment thereto increasing the capital thereof, shall be accepted for record by the recorder of deeds in any county in this Commonwealth unless there be annexed thereto a receipt of the State Treasurer for the amount of bonus due under this act, said receipt to be made a part of the articles of association and recorded therewith.[14]

Any company formed under the provisions of either of the foregoing acts, which shall not pay the bonus required by this act, the articles of association thereof shall be void and of no effect, and every person a party thereto shall be held liable as general partners.[15]

781. Forfeiture of Charters for Non-Payment of Arrears of Bonus.

Any corporation created by special or general law, in arrears for bonus upon the amount of capital stock which such corporation is authorized to have, or in arrears for bonus upon any authorized increase thereof, which shall neglect or refuse to pay the same to the State Treasurer within one year after the passage of this act, the charter thereof is hereby declared to be forfeited, and such corporation shall not thereafter exercise any corporate powers or privileges, but the charter thereof shall be absolutely void and of no effect.[16]

(13) Sec. 1, Act May 8, 1901, P. L., 149.

(14) Sec. 2, Act May 8, 1901, P. L., 149.

(15) Sec. 3, Act May 8, 1901, P. L., 149.

(16) Act of May 21, 1901, P. L., 270. This act is not to be taken too seriously. Sec. 3, of the Act of April 24, 1874, P. L., 68, provided that corporations failing to make reports and pay State taxes should forfeit their charters on the proclamation of the Governor, and a large number of charters were thus declared forfeited, but many of the corporations are still doing business under the said charters, and no one has seriously contended that vested corporate rights may be forfeited by proclamation, or in any other manner than by judicial proceedings.

782. Act of May 11, 1899 (P. L. 289).

This act does not refer to bonus on charters, but gives to the counties of Pike and Susquehanna an annuity of $10,000 required by the State from the New York, Lake Erie and Western Railroad Company for passing through those counties. Act of March 26, 1846, P. L., 179. The said railroad was not relieved from local taxation on account of the payment of said annuity, and the recital in the act is false and misleading. See Erie R. R. Co. *v.* Com. 66 Pa., 84; Cases on State Tax on Corporate Loans, 25 W. N. C., 19.

783. Decisions Relating to Bonus.

Bonus is defined by the courts to be the price paid the Commonwealth by a corporation for the privileges conferred on such corporation by its charter. Com. *v.* Coal Co., 13 W. N. C., 324. It is defined by Bouvier as "A premium paid to a grantor or founder as . . . . a bank paid a bonus to the State for its charter; a consideration for what is received." It is, therefore, in no sense a tax, and the payment thereof does not relieve any corporation from any tax to which it is otherwise subject.

Banks incorporated under letters patent, under the provisions of the Act of April 26, 1889, P. L., 61, are subject to the payment of bonus on the amount of authorized capital with which they are incorporated, but banks whose charters are extended by a certificate of the Secretary of the Commonwealth, under the provisions of the Act of May 10, 1889, P. L., 185, are not required to pay bonus on such extension. Warren Savings Bank *v.* Com., Dauphin C. P., No. 376, June T., 1893.

Corporations whose charters are about to expire by their own limitation, desiring to be rechartered, must pay bonus. In re Payment of Bonus by Corps. being Rechartered. Rep. Atty. Gen., 1895-6, 369 (1879).

A company having paid a bonus when originally incorporated is not required to pay an additional bonus before it can accept the provisions of the Act of 1874. Bonus, Rep. Atty. Gen., 1895-6, 308 (1874).

The lien of the Commonwealth for bonus is discharged by judicial sale. Reorganization of a Corporation by Purchasers at Judicial Sale. Rep. Atty. Gen., 1895-6, 385 (1883).

Hence companies organized after purchase at judicial sale of

the franchises of other companies are not required to pay any balances of bonus due by said companies. Id.

Payment of bonus is in no sense an implied contract not to tax a company further. And where a bonus is exacted upon a renewal of charter, by way of exemption from taxation during its renewal, it does not relieve from the payment of taxes already accrued. Com. *v.* Girard Bank, 2 Pears., 323.

The repeal of a statute imposing a bonus upon corporations organized thereunder releases such a corporation from liability for accrued but unpaid bonus. Com. *v.* Alliance Coal Co., 13 W. N. C., 324 (1883).

A corporation chartered in 1865 by a special act of the Legislature, which conferred the unconditional privilege of "increasing its capital stock from time to time," cannot be required, upon an increase of its capital stock, to pay the bonus which, by the Act of 1874 is required to be paid by corporations upon an increase of stock under that act. To require such payment would be to impair the obligations of a contract contained within the charter. Com. *v.* Western Trans. Co., 107 Pa., 112 (1884).

Foreign corporations becoming domestic companies under the provisions of the Act of June 9, 1881, P. L., 89, are required to pay bonus. The first section of said act provides that foreign companies "may become corporations of this State *under the provisions of said last-named act,*" viz.: the Act of April 29, 1874, and, as said act provides for the payment of bonus by all corporations incorporated for profit, except those hereinbefore enumerated, under its provisions, bonus is evidently payable by such foreign corporations becoming domestic companies. See Sec. 725.

Where a company is incorporated with the privilege of performing the operations peculiar to different classes of companies, some of which companies are by law exempt from the payment of bonus, the question whether or not such company is subject to the payment of bonus will depend upon the principal business actually transacted by such corporation. If the business in which it is principally engaged is of the nature of the business transacted by companies which are not exempted from the payment of bonus, such company will be required to pay bonus, even though it may also be engaged in business similar to that transacted by companies which are by law exempted from the payment of bonus. International Navigation Company *v.* Com., 104 Pa., 38 (1883).

A corporation organized by the merger of two other corporations, under the provisions of the sixth section of the Act of April 17, 1876, and which, upon such merger, increases the combined capital stock, is liable to pay to the Commonwealth a bonus of one-quarter of one per centum, imposed by the Act of April 29, 1874. Com. *v.* Alliance Coal Mining Co., 13 W. N. C., 324 (1883); 16 Phila., 575.

The bonus imposed upon corporations by the Act of April 29, 1874, is not a tax, but the price paid for the charter privileges, and a bonus remaining unpaid, after the time specified in the act, is a debt which bears interest until paid at the rate of six per cent. *Ibid.*

A corporation formed under a special charter, with the right to increase its capital, nothing being said about bonus in its charter, is not subject to bonus upon increases of capital stock made after the passage of the bonus acts of 1868 and 1874, under the provisions of those acts. Com. *v.* Erie and Western Transportation Co., 16 W. N. C., 140 (1884); 107 Pa., 112.

The following acts relate to special classes of corporations:

By the Act of March 22, 1887, Sec. 10, P. L., 8, *traction and motor companies* pay the same bonus as provided by the Act of April 29, 1874, and companies reorganized under said Act of 1887 are credited with the amounts of bonus which may have been previously paid by them.

Under the provisions of the Act of May 29, 1885, Sec. 15, P. L., 29, *natural gas companies* organized under said act pay bonus as provided in the Act of 1874, and, on reorganizing under the Act of 1885, companies are credited with the bonus which they may previously have paid.

The Act of June 25, 1895, P. L., 312, which provides for the extension of the charters of *manufacturing companies* incorporated under the Act of April 29, 1874, the charters of which were limited in operation to a period of twenty-five years, also provides that such companies so renewing their charters shall first pay "the fee and bonus on their capital stock now fixed by law for the renewal or extension of a corporate charter."

Where an act provides that the bonus to be paid by the corporations formed under it shall be at the same rate provided by the Act of April 29, 1874, the rate will be one-third of one per cent., under the provisions of the Act of 1899.

Railroad companies incorporated under the Act of April 4,

1868, P. L., 62, may under authority of the Act of June 4, 1883, P. L., 67, increase their capital stock up to $150,000 per mile without paying any bonus thereon, and where several railroad companies, having under the said Act of 1883 the right, severally, to increase their capital stock to $150,000 per mile, merge and consolidate, the consolidated company has, under the Act of May 16, 1861, P. L., 702, the same right, though the consolidation took place after the passage of the Act of May 3, 1899, P. L., 189, imposing bonus on railroad companies for the first time. Com. *v.* Buffalo and Susquehanna R. R. Co., 207 Pa., 154 (1903); Com. *v.* Buffalo, R. and P. Ry. Co., 207 Pa., 160 (1903).

TAX ON CAPITAL STOCK.

784. What Classes of Corporations Are Subject to the Tax.

The following classes of corporations are subject to the tax on capital stock:

1. Every corporation having capital stock, every joint-stock association, and limited partnership whatsoever, organized or incorporated by or under any law of this Commonwealth, or which may hereafter be so organized or incorporated.

2. Every corporation, joint-stock association, and limited partnership whatsoever, now or hereafter incorporated or organized by or under the laws—

(a) Of any other State or Territory of the United States.

(*b*) By the United States, or

(*c*) By any foreign government.

And doing business and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of any limited partnership, joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner.

3. *Except* in the case of (*a*) banks, (*b*) savings institutions, and (*c*) foreign insurance companies.

The Act of June 13, 1907, P. L., 640, imposing a tax on the shares of trust companies appears to relieve such companies, by implication, from liability to the payment of the tax on capital stock.

The tax is imposed annually, at the rate of five mills upon each dollar of the actual value of the whole capital stock of all kinds, including common, special, and preferred.

The tax is settled by the accounting officers upon the basis of a report required to be made by all companies subject to the tax, and, particularly, upon an appraisement of the value of the stock contained in such report, made, under oath, by two officers of the company making the report, as more fully hereinafter set forth.

In this appraisement the said officers are required, between the first and fifteenth days of November in each year, to estimate and appraise the capital stock of their corporation at its actual value in cash, not less, however, than the average price for which said stock sold during the year, and not less than the price or value indicated or measured by net earnings, or by the amount of profit made and either declared in dividends, or carried into surplus or sinking fund.

785. Acts Imposing the Tax.

The acts now in force governing taxation of capital stock are those of June 8, 1891, P. L., 229, and June 7, 1907, P. L., 430, which provide as follows:

Act of June 8, 1891,* Sec. 4, amending Sec. 20, Act of June 1, 1889:

*The Preamble to the Act of June 8, 1891, is of interest, as throwing light upon the object sought to be obtained by said act, and is, therefore, here given:

"Whereas, There is a widespread demand for the enactment of such measures as will bring about the equalization of taxation and the relief of local taxation upon real estate;

"And whereas, Moneyed capital, taxable under the first section of the act entitled 'A further supplement to an act, entitled "An act to provide revenue by taxation," approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine,' approved the first day of June, Anno Domini one thousand eight hundred and eighty-nine, does not bear its just proportion of the burden of local taxation;

"And whereas, it is desirable largely to increase the State appropriation for the support of the public schools, out of an increased taxation upon the capital stock of certain corporations imposed by the twentieth and twenty-first sections of said act; And whereas, Experience has shown that the said twentieth and twenty-first sections result, in many cases, in requiring corporations which pay dividends less than six per centum to pay a larger amount of tax than corporations paying dividends of six per centum are required to pay;

"And whereas, also, It has shown that the mode prescribed in the twenty-first section of said act for taxing corporations paying dividends of six per centum and upward at a rate of tax to be measured by the dividends results, in many cases, in corporations with large investments in bonds, mortgages, and moneys at interest, paying a less rate of tax than

Hereafter, except in the case of banks, savings institutions, and foreign insurance companies, it shall be the duty of the president, chairman, or treasurer of every corporation having capital stock, every joint-stock association and limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this Commonwealth, and of every corporation, joint-stock association, and limited partnership whatsoever now or hereafter incorporated or organized by or under the laws of any other State or Territory of the United States, or by the United States, or by any foreign government, and doing business in and liable to taxation within this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of any limited partnership, joint-stock association, company, or corporation whatsoever, association or associations, copartnership or copartnerships, person or persons, or in any other manner, to make a report in writing to the Auditor General in the month of November, one thousand eight hundred and ninety-two, and annually thereafter, stating specifically:

"*First.* Total authorized capital stock.

"*Second.* Total authorized number of shares.

"*Third.* Number of shares of stock issued.

"*Fourth.* Par value of each share.

"*Fifth.* Amount paid into the treasury on each share.

"*Sixth.* Amount of capital paid in.

"*Seventh.* Amount of capital on which dividend was declared.

"*Eighth.* Date of each dividend declared during said year ended with the first Monday of November.

"*Ninth.* Rate per centum of each dividend declared.

"*Tenth.* Amount of each dividend during the year ended with the first Monday in said month.

"*Eleventh.* Gross earnings during the year.

"*Twelfth.* Net earnings during said year.

"*Thirteenth.* Amount of surplus.

other corporations without capital stock and individual citizens are required to pay, under the first section of said act, upon the same kind of property;

"And whereas, also, It appears that the taxes imposed upon corporations and individual citizens by the first and twenty-first sections of said act can be made much more nearly uniform by taxing all corporations, limited partnerships, and joint stock associations having capital stock, at a fixed rate of five mills upon each dollar of the actual value of their whole capital stock, including as well their bonds, mortgages, and moneys at interest, as their franchises and property of other kinds."

"*Fourteenth.* Amount of profit added to sinking fund during said year.

"*Fifteenth.* Highest price of sales of stock between the first and fifteenth days of November aforesaid.

"*Sixteenth.* Highest price of sales of stock during the year aforesaid.

"*Seventeenth.* Average price of sale of stock during the year; and in every case any two of the following-named officers of such corporation, limited partnership, or joint-stock association, namely: the president, chairman, secretary, and treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year, estimate and appraise the capital stock of the said company at its actual value in cash, not less, however, than the average price which said stock sold for during said year, and not less than the price or value indicated or measured by net earnings or by the amount of profit made and either declared in dividends or carried into surplus or sinking fund, and when the same shall have been so truly estimated and appraised they shall forthwith forward to the Auditor General a certificate thereof, accompanied with a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same: *Provided,* That if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties, and interest due the Commonwealth thereon, with right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association, or limited partnership, for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association, or limited partnership, and settle an account for taxes,

penalty, and interest thereon, from which settlement there shall be no right of appeal."

Sec. 1, Act June 7, 1907, P. L., 430, amending Sec. 1, Act of June 8, 1893, which amended Sec. 5 of the Act of June 8, 1891, which amended Sec. 21 of the Act of June 1, 1889, P. L., 420:—

"Every corporation, joint-stock association, limited partnership, and company whatsoever from which a report is required under the twentieth section hereof shall be subject to and pay into the treasury of the Commonwealth annually a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section, and it shall be the duty of the treasurer or other officers having charge of any such corporation, joint-stock association, or limited partnership upon which a tax is imposed by this section to transmit the amount of said tax to the treasury of the Commonwealth within thirty days from the date of settlement of the account by the Auditor General and State Treasurer: *Provided,* That for the purposes of this act interests in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxable accordingly: *Provided, also,* That corporations, limited partnerships, and joint-stock associations liable to tax on capital stock under this section shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them and in which the whole body of stockholders, or members as such, have the entire equitable interest in remainder; but corporations, limited partnerships, and joint-stock associations owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders, or members thereof, as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them, as in the case of individuals: *And provided, further,* That the provisions of this section shall not apply to the taxation of so much of the capital stock of corporations, limited partnerships, or joint-stock associations organized for manufacturing purposes which is invested in and actually and exclusively employed in carrying on manufacturing within the State, except companies engaged in the brewing or distilling of spirits or malt liquors and such as enjoy and exercise the right of eminent domain; but every manufacturing corporation, limited partnership, or joint-stock association shall pay the State tax

of five mills herein provided upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to its manufacturing business, in addition to the local taxes assessed upon its property in the districts where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing plant and business: *Provided, further,* In case of fire or marine insurance companies the tax imposed by this section shall be at the rate of three mills on each dollar of the actual value of the whole capital stock."

Sec. 22, Act of June 1, 1889.

If the said officers of any such limited partnership, joint-stock association, or corporation shall neglect or refuse to furnish the Auditor General, on or before the thirty-first day of December in each and every year, with the report and appraisement [of capital stock] as aforesaid, as required by the twentieth section of this act, it shall be the duty of the accounting officers of the Commonwealth to add 10 per centum to the tax of said limited partnership, joint-stock association, or corporation, for each and every year for which such report and appraisement were not so furnished, which percentage shall be settled and collected with the said tax in the usual manner of settling accounts and collecting such taxes; if the officers of any such limited partnership, association, joint-stock association, or corporation, or any of them, shall intentionally fail to comply with the requirements of the twentieth section of this act for three successive years, he or they shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of five hundred dollars and undergo an imprisonment not exceeding one year, or both or either, at the discretion of the court.

786. Special Acts Relating to the Tax on Capital Stock—Bourse Companies.[1]

Distilling Companies.

The Act of July 15, 1897, P. L., 294, provides as follows:

Sec. 2. Companies organized and incorporated for the purpose of distilling liquors and selling the same at wholesale, shall constitute a separate class for the purpose of taxation; and every

(1) See Secs. 1063-1066.

such corporation, joint-stock association, limited partnership, or company shall be subject to pay into the treasury of the Commonwealth, annually, a tax at the rate of ten mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred. The Auditor General shall require said corporation to report to him, annually, all such facts as may be by him deemed necessary to arrive at the actual value of the capital stock of said corporation. He is hereby authorized and required to send out blanks in proper form, to secure such information as all other corporations are required by law to give the accounting officers in their annual reports, so that the actual value of the capital stock may be ascertained.

787. What the Tax Is.

The tax upon capital stock of corporations is a tax upon their property, franchises, assets, and earning capacity. Fox's Appeal, 112 Pa., 337 (1886); Coatesville Gas Co. *v.* Chester Co., 97 Pa., 476 (1881); Com. *v.* Standard Oil Co., 101 Pa., 119 (1882); Pullman's Pal. Car Co. *v.* Com,. 141 U. S., 18; Com. *v.* N. Y., P. & O. R. R. Co., 188 Pa., 169 (1898); Com. *v.* Sharon Coal Co., 164 Pa., 284 (1894); Com. *v.* Ontario, Carbondale and Scranton Ry. Co., 188 Pa., 205 (1898).

The tax upon capital stock is constitutional. Com. *v.* National Oil Co., 157 Pa., 516 (1893); Com. *v.* Mill Creek Coal Co., 157 Pa., 524 (1893).

Foreign corporations doing business in Pennsylvania are taxable, like domestic corporations, on so much of their capital as is invested within the Commonwealth, under the provisions of the fourth section of the Act of June 8, 1891, as amended by the Acts of 1893 and 1907.

It was formerly necessary, in order for a foreign corporation to become taxable on its capital stock in Pennsylvania, not only that it should have capital invested in the Commonwealth, but that it should also exercise its corporate functions therein. Com. *v.* Standard Oil Co., 101 Pa., 119 (1882).

The fourth section of the Act of 1891, as amended by the Acts of 1893 and 1907, however, makes taxable the capital stock not only of foreign corporations "doing business in and liable to taxation within this Commonwealth," but also of those "having capital or property employed or used in this Commonwealth;" so that the decision cited is, doubtless, not applicable to the law now in force.

788. Foreign Transportation Companies.

The fact that a foreign transportation company running its cars into, through, and out of the State, also operates them in other States, does not exempt the company from taxation upon the capital invested in said cars, in Pennsylvania. Pullman's Pal. Car Co. *v.* Com., 107 Pa., 156 (1884). Palace car companies whose cars run into this State and other States are taxable upon the proportion of their capital stock which the total number of miles traveled in Pennsylvania by their cars bears to the total number of miles traveled by all their cars in all States. Pullman's Pal. Car Co., 141 U. S., 18; Com. *v.* Pullman's Pal. Car Co., 2 D. R., 618; 13 Pa. C. C., 54.

For an account of the method of taxing Pullman's Palace Car Co., see Sec. 829.

Railroad companies whose lines extend from Pennsylvania into other States are taxable upon the proportion of their capital stock which the miles of their main track in Pennsylvania bear to the total mileage of the companies. Com. *v.* Erie Railway Co., 98 Pa., 127; Com. *v.* Western U. Tel. Co., 15 W. N. C., 331; Com. *v.* Del., L. & W. R. R., 145 Pa., 96.

789. How the Tax Is Settled Against Telegraph Companies.

Foreign and domestic telegraph companies, which do business in many States, and whose facilities for doing business in one State increase the same in another, are to be taxed, where the relative value of the tangible property representing capital within and without the State cannot be accurately ascertained, on the proportion of their entire capital stock which the length of their lines within the State bears to the total length of all their lines. Com. *v.* Western U. Tel. Co., 15 W. N. C., 331.

In the case above cited, it appeared, as a matter of fact, that the cost of constructing a mile of telegraph line, with poles and one wire, was equal to the cost of six additional wires upon the same poles. In settling tax on capital stock against telegraph companies the accounting officers generally use this ratio in making their calculations, unless a different ratio of cost is known to exist in any particular case.

790. Bridge Companies.

Bridge companies connecting this with another State are taxable in Pennsylvania upon one-half of their capital stock only. Com. *v.*

Trenton Bridge, 9 Am. L. Reg. (O. S.), 298; Easton Bridge Co. *v.* Northampton Co., 9 Pa., 415.

791. Fire and Marine Insurance Companies.

It will be observed that the rate of tax on fire and marine insurance companies organized under the laws of Pennsylvania is at the rate of three mills on the dollar of the cash value of their capital stock, instead of five mills, as in the case of other corporations subject to the tax.

792. Reports and Appraisements.

Blanks upon which to make reports of capital stock are sent to the treasurer of each corporation subject to tax, by the Auditor General, on or about the first of November in each year. If these are not executed and returned on or before December 31st, following, the companies so failing to report within said period are subject to a penalty of 10 per centum of the amount of tax finally settled. Sec. 22 of the Act of June 1, 1889, provides, that if the officers of corporations subject to the capital-stock tax shall intentionally fail to make reports to the Auditor General, as above, for three consecutive years, they shall be deemed guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine of five hundred dollars and undergo an imprisonment not exceeding one year, or both, in the discretion of the court. This same section provides the penalty of ten per centum above referred to.

A further penalty for failure to make reports of any kind required by law to the Auditor General is provided by the Act of April 14, 1905, P. L., 166, as follows:—

In case of any corporation, joint-stock association, limited partnership, or companies whatsoever, formed, erected, incorporated or organized by or under any law of this Commonwealth, general or special; or formed, erected, incorporated or organized under the laws of any other State or country, doing business in this Commonwealth, of any kind whatsoever; or having filed a statement of location of office in the office of the Secretary of the Commonwealth; or having registered in the Auditor General's Department, except such corporations, joint-stock associations, limited partnerships, or other companies as are now by the several Acts of Assembly of this Commonwealth specifically exempted from making reports to the Auditor General's Department, shall neglect or refuse to make reports to the Auditor General, as re-

quired by the several provisions of law, for any three tax years, such corporation, joint-stock association, limited partnership or other company shall be liable to a penalty of five hundred dollars ($500), which shall be settled against such corporation, joint-stock association, limited partnership or other company by the Auditor General and State Treasurer, in the same manner as State taxes are now settled against corporations, joint-stock associations, limited partnerships or other companies: *Provided,* That this act shall not be construed to relieve such corporations, joint-stock associations, limited partnerships or other companies from the liability to any penalty or penalties now in force by provision of law.

The penalty imposed by this act shall be a lien upon the franchises and property, both real and personal, of such corporations, joint-stock associations, limited partnerships or other companies, from the date of settlement by the Auditor General and State Treasurer.

Sec. 4 of the Act of June 8, 1891, provides, *inter alia,* that:

"In the event of the neglect or refusal of the officers of any corporation . . . . for a period of sixty days, to make the report and appraisement to the Auditor General as herein provided, it shall be the duty of the Auditor General and State Treasurer to estimate a valuation of the capital stock of such defaulting corporation . . . . and settle an account for taxes, penalty, and interest thereon, from which settlement there is no right of appeal."

This doubtless supersedes the general provisions of the Act of March 30, 1811, for the making of estimated settlements, so far as the tax on capital stock is concerned. Whether it also repeals, by implication, the above provision of the Act of 1889, making a failure to report a misdemeanor, has never been determined.

Iron and steel companies, incorporated under the provisions of Sec. 38, of the Act of April 29, 1874, are liable to a special penalty of $500 for neglect or refusal to make tax reports to the Auditor General, in such manner and form as may be prescribed by law, Cl. 3, Sec. 38, Act of April 29, 1874.

The appraisement of the stock of a corporation must be made in accordance with the following requirements:

1. It must be made by any two of the following officers: President (or chairman), secretary, and treasurer; and where one per-

son holds two offices, one other officer must join with him in making the appraisement.

2. The stock must be appraised at "its actual value in cash." A stock may have no market value, and yet have a very considerable intrinsic or prospective value. The price for which a majority of the stockholders would sell their shares is ordinarily to be considered a fair measure of the actual value of the capital stock, subject to the following requirements and limitations:

"A stock may have several values; a market value, determined by the selling price of its shares in open market; a speculative value, based on calculations of future prospects and contingencies; and the actual value, ascertainable from the intrinsic worth of its assets immediately available or unavailable, on its profits or losses, covering a fixed period, and on business calculations for the future; and other elements in the minds of business men may be taken into account." Com. *v.* Edgerton Coal Co., 164 Pa., 284.

3. The actual value in cash must be given as it was between the first and fifteenth days of November for the year for which the report is made, and the value at that time was formerly decisive as to the value for purposes of taxation, provided it be not less than the average price for which the stock shall have sold during the tax-year. Pa. R. R. *v.* Com., 94 Pa., 474; Com. *v.* P. & R. R. R., 145 Pa., 74 (1891); 29 W. N. C., 101.

4. The stock must not be assessed at *less* than the average price at which it shall have sold during the tax-year, but it may and should be appraised at *more* than such average price, if the value of the capital stock between November 1st and 15th was greater than such average price. Com. *v.* Penna. R. R., 145 Pa., 74 (1891).

5. It must, further, not be appraised at a less value than its price or value as indicated by its net earnings, or amount of profit made, and either declared in dividends or carried into surplus or sinking fund. This provision, like the foregoing, establishes merely a minimum valuation below which the appraisement shall not be made, notwithstanding the actual value between November 1st and 15th. In other words, the appraisement never can be at a lower valuation than the actual value indicated by the price paid between November 1st and 15th, but it may be at a higher valuation:

(a) If the average price for the year were higher;

(b) If the net earnings or profits indicate a higher value.

What value *is* indicated by a given amount of net earnings or

profits is a question incapable of determination applicable to all cases. It was attempted by the accounting officers, after the passage of the Act of June 8, 1891, to lay down a general rule that a stock paying six per cent. was worth par, one paying twelve per cent. was worth twice par, and so on in the same proportion.

This practice was founded on the dividend basis of taxing capital stock, which had obtained under former acts. Under the dividend-basis system, the capital stock of a corporation was taxed at one-half mill for each one per cent. of dividend paid or earned, where the dividends equaled or exceeded six per cent. Where the dividends were less than six per cent., the tax was three mills upon the appraised value of the capital stock. One-half mill for each one per cent. of dividend was the same, where a company paid exactly six per cent. in dividends, as three mills on the appraised value of the stock. Hence it was assumed that the former acts had considered a stock paying six per cent. in dividends as worth par; and on this basis the practice above referred to was sought to be established.

The Supreme Court, however, in the cases of Com. *v.* Del. Sus. & Sch. R. R. Co., 165 Pa., 44 (1894), and Com. *v.* Edgerton Coal Co., 164 Pa., 284 (1894), held, that, in the absence of proof to the contrary, such an hypothesis might be resorted to, but that the true value of the stock of a corporation was a question of fact to be determined in each case; not only from the net earnings and profits, but from all other facts affecting the value of the stock.

The true effect, therefore, of the requirements relative to the net earnings and profits of a company seems to be, that, if such earnings or profits seem to indicate a higher value than that at which the stock is appraised, the accounting officers will require an explanation of the discrepancy, and, in the absence of a satisfactory explanation, they will raise the amount of the appraisement.

The fact that the accounting officers settle upon the value of the stock of a company, at a valuation the same as the local appraisement of its property, does not necessarily imply that they did not take other elements properly entering into the value of such stock, into consideration. Com. *v.* Manor Gas Coal Co., 2 Dau. Co. Rep., 121 (1899).

When the "average price" was ascertained by multiplying the number of shares sold at each sale by the price paid per share, adding together the amounts paid at all the sales and dividing this

sum by the number of shares sold, it was held not to be an erroneous method of ascertaining such average price. Com. *v.* People's Traction Co. of Philada., 183 Pa., 405 (1898). Shares of stock distributed to stockholders during the tax year at less than their actual value must be appraised, not at the price at which they were distributed, but at their actual value, and must be taxed for the proportion of the tax year remaining at the date of distribution. *Ibid.*

793. Weight to Be Given to Prices at Which Shares Sell.

The price for which the shares of stock of a corporation sell is not necessarily conclusive as to the actual value of the capital stock of said company. The capital stock must not be appraised at less than the average price for which the shares sold during the year, but it may be appraised *above* that value if the value between the first and fifteenth days of November was higher, and if the value indicated by net earnings or profits was higher. The following quotations from decisions of the courts show the weight which is to be given to the price at which shares of stock may have sold:

"While the price at which shares sell in the public market is not conclusive, and we would not feel ourselves bound by it where we were satisfied that all the relevant evidence in the case leads to the conclusion that it did not indicate the real value, we nevertheless feel that it is ordinarily entitled to careful consideration as an expression of the opinion of those presumably best acquainted with the actual financial status." Com. *v.* Phila. Co., 164 Pa., 284. (Opinion of lower court.)

"The aggregate market value for which the stocks will sell in the market does not necessarily indicate the actual value or the amount of property which a corporation may own. . . . . It may fall very short of it. Valuation includes, beside the value of the property, profits, and prospects, nature and extent of rights, and privileges and enjoyments." Com. *v.* D. S. & S. R. R. Co., 165 Pa., 44.

"A review of the facts shows that this appraisement is much in excess of the actual value of the capital and surplus of defendant, as shown on its books, and that a large item must be credited to the value of the defendant's franchise and its capacity to earn dividends. This illustrates what has been said in the case of Com. *v.* D., S. & S. R. R. Co., as to the principles on which the

actual value in cash . . . . is to be ascertained, and the elements which enter into the calculation, and demonstrates that the franchise . . . . the right to carry on business, the privileges and immunities of the corporation, may be and frequently are of great value, and are properly subject to taxation." Com. *v.* Provident L. & T. Co., 164 Pa., 284. (The quotation is from the opinion of the court below.)

From the foregoing it will be seen that the price at which the shares of stock of a corporation may have sold is not conclusive as to the actual value of the capital stock of said company. The capital stock is to be appraised at its actual value in cash between the first and fifteenth days of November, and, if the shares of stock shall have sold for a higher average price than that value during the year, the capital stock must be appraised at at least as great value as such average price. If, in addition, the net earnings or profits, the property, assets, and franchises of the company indicate a still higher value than such average price, then the capital stock must be appraised at the value so indicated.

794. Other Matters to Be Considered in Making Appraisements.

"The capital stock represents the franchises as well as the property of the company. In the sixth preamble of the act (of 1891) there appears a plain legislative purpose to include the franchise in fixing the value of the stock, and this is in harmony with the title and the provisions in respect to the taxation of it." Com. *v.* Del., Sus. & Sch. R. R. Co., 165 Pa., 44 (1894).

Where, owing to some extraordinary circumstances, such as losses by fire, the capital stock is worth less than its net earnings or profits would indicate, the stock should be appraised in accordance with the foregoing instructions, and the discrepancy between the appraised value and that indicated by the net earnings or profits should be explained in a sworn statement, made a part of the report.

In appraising capital stock the amount of the indebtedness of a corporation may not be deducted from the value of the stock. Com. *v.* N. Y., P. & O. R. R. Co., 188 Pa., 169 (1898). This does not mean that the indebtedness of a company will not be taken into consideration when appraising the stock, or by the accounting officers when making settlements for taxes, but simply that the officers of a corporation, when appraising their stock for purposes of taxation, will not be permitted to say, "Our property,

represented by our stock, is worth $500,000; but we have $400,000 of bonds outstanding, and therefore we will appraise our stock at but $100,000."

Under the Act of June 8, 1891, P. L., 229 and amendments, the question of the actual value in cash of the capital stock of a corporation is a question of fact which must be determined by considering the value of the corporation's tangible property and assets of every kind, including its bonds, mortgages and moneys at interest, and its franchises and privileges. The amount of the encumbrances on its property and franchises is also a relative fact to be considered, but it is not to be specifically deducted from the valuation so ascertained and determined. Com. *v.* American Coke Co., 5 Dau. Co. Rep., 151 (1902).

Where appraisements are not made in accordance with the foregoing requirements, the accounting officers exercise the discretion vested in them by the following provision of law, and raise the appraisements to such amounts as to them may seem proper, and settle tax thereon.

. . . . *Provided,* That, if the Auditor General and State Treasurer, or either of them, is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof based upon the facts contained in the report herein required, or upon any information within their possession, or that shall come into their possession, and to settle an account on the valuation so made by them for the taxes, penalties, and interest due the Commonwealth thereon, with a right to the company dissatisfied with any settlement so made against it to appeal therefrom in the manner now provided by law. Sec. 4, Act of June 8, 1891, P. L., 229.

This provision, or a similar one, was first introduced in the Revenue Act of April 24, 1874, P. L., 68, and has been incorporated in all subsequent revenue acts.

795. Deduction from Taxable Value of Capital Stock on Account of Amount Paid on Corporate Loans.

The case of Commonwealth *v.* New York, Pennsylvania & Ohio R. R. Company, 188 Pa., 169 (1898), and related cases,[17] de-

(17) Com. *v.* Pine Creek Ry. Co., 188 Pa., 198 (1898); Com. *v.* Fall Brook Ry. Co., *Id.*, 199 (1898); Com. *v.* Beech Creek R. R. Co., *Id.*, 203 (1898); Com. *v.* Ontario, Carbondale & Scranton Ry. C., *Id.*, 205 (1898).

cided that in settling tax against the capital stock of a corporation no deduction should be allowed on account of the indebtedness thereof, but that the corporation should be taxed upon the actual value of its property and franchises. To do this, and at the same time to tax the holders of the indebtedness of the company, would be to impose double taxation, inasmuch as the obligations of the company represent, ordinarily, money which has entered into the value of the capital stock, which has already been taxed to the corporation. To overcome this injustice the accounting officers, although there is no warrant of law therefor, in order to effect equitable settlements of taxes, sometimes deduct from the value upon which the capital stock would otherwise be taxable, an amount equal to what the tax on corporate loans collected and paid by the corporation would amount to when capitalized at five mills, the rate of the capital stock tax. For example, the capital stock of a corporation would otherwise be taxed at a valuation of $1,000,000. It pays $400 tax on corporate loans; $400 is five mills on $200,000, which amount is, therefore, deducted from the $1,000,000, and the company is taxed on a valuation of $800,000.

As this method permits of deductions only on account of tax actually paid on loans, the investment in the corporation of foreign bondholders is reached through the stock.

796. Penalty for Failure to Make Reports.

The questions on page 1 of the capital stock report blank must be answered as fully as possible, and where the facts justify the same the word "None" or "Nothing" should be distinctly written opposite the proper question, instead of leaving such question unanswered, or making a dash or wave-line opposite to it.

Reports may be filed at any time between the first Monday of November and the thirty-first day of December succeeding. If not filed on or before the latter date, a penalty of ten per cent. is required to be added to the amount of the tax, by the accounting officers, under the following provision:

If the said officers of any such limited partnership, joint-stock association, or corporation shall neglect or refuse to furnish the Auditor General, on or before the thirty-first day of December in each and every year, with the report and appraisement as aforesaid, ... it shall be the duty of the accounting officers to

add ten per centum to the tax . . . . for each and every year for which said report and appraisement were not so furnished, which percentage shall be settled and collected with the said tax in the usual manner of settling accounts and collecting such taxes. Sec. 22, Act of June 1, 1889, P. L., 420. The subject of failure or neglect to report, altogether, has already been considered above.

A corporation which, on making inquiry of the Auditor General, is informed that it owes no taxes to the State, is relieved from any penalty for the non-payment of taxes which were, in fact, then due, but not, of course, from taxes. Com. *v.* Del. Div. Canal Co., 50 Pa., 399 (1865); 2 Pears., 365.

797. Settlements of Capital Stock Tax.

On the receipt of the capital stock reports by the Auditor General, they are filed as of the date of their receipt, and are then taken up in order, and settlements for the tax on capital stock are made thereon by the Auditor General. The settlements and reports are then sent to the Treasury Department, where the settlements are approved by the State Treasurer. The papers are thereupon returned to the Auditor General, who has a copy of each settlement made, and certified under his hand and official seal, which copy is then mailed to the treasurer of the company against which the settlement was made, which company then has sixty days, as we have already seen, from notice of the settlement (*i. e.*, from the receipt of the copy), within which either to pay the tax, or, if dissatisfied with the settlement, to take an appeal to the Court of Common Pleas of Dauphin county. At the expiration of the said sixty days the settlement becomes final, and is conclusive against the company. The tax bears interest at 12 per cent. per annum from sixty days after date of settlement.

Where a company is incorporated during the tax-year, tax is settled upon its capital stock in the same proportion that the number of days during which it has been in existence during the tax-year bears to the whole number of days in such year; that is to say, if a company has been in existence six months of the tax-year only, its tax will be but one-half of what it would be for the entire year; if in existence but three months, then the tax would be but one-fourth of the tax for a year, and so on. Com. *v.* Wyoming Valley Canal Co., 50 Pa., 410 (1865).

The above is the uniform practice of making settlements against

corporations for taxes, and the subject will not again be referred to in the consideration of other taxes.

798. Suggestions as to Making Reports.

Where corporations are dissatisfied with the settlements made against them, or do not understand the basis upon which they are made, they should at once inquire of the Auditor General the manner in which the amount of tax is arrived at, so that if there is any error in their reports, or if any part thereof has been misunderstood, they may file an affidavit making the necessary correction or explanation, with a request for a resettlement of the account. This often saves the expense of taking an appeal, and avoids the annoyance caused by permitting settlements to stand undisputed until they are of more than a year's standing, when only the Board of Public Accounts can resettle them. The tax on capital stock being a tax on the property, franchises, assets, etc., of a corporation (see supra), it follows that companies must make reports and pay taxes from the date of their incorporation, or from the date of investing capital in Pennsylvania, and *not* from the date of beginning business, nor from that of the issuing of certificates of stock.

799. Distinction Between Capital Stock and Shares of Stock.

There is a marked distinction between the capital stock of a corporation and its *shares* of stock. The capital stock represents the entire property, assets, earning capacity, and franchises of a company (see supra), while the shares of stock merely show what interest each individual shareholder has in such property and assets and the enjoyment of the franchises. Com. *v.* Standard Oil Co., 101 Pa., 119 (1882); Bidwell *v.* Pgh., O. & E. L. Pass. Ry. Co., 114 Pa., 535 (1886). The tax which we are considering is upon the capital stock, and not upon the shares of stock. Hence it is immaterial when the certificates of stock of a corporation are issued, or whether they are ever issued. The capital stock is taxable without regard thereto.

Most classes of domestic corporations are required, before letters patent issue to them, to have at least ten per cent. of the amount of their authorized capital stock paid into their treasuries in cash, so that, as soon as these companies are incorporated, their capital stock has a taxable value.

800. When Capital Stock Has No Value.

When the capital stock of a corporation has no actual value

whatever, its officers must nevertheless continue to make formal reports, precisely as if the capital stock had value, save that they will appraise the capital stock at so many shares, each of the value of nothing, of the aggregate value of nothing; and such reports must be made annually while such stock remains worthless, or until the company is dissolved by decree of court, it being as necessary that the records of the Auditor General's Department should show why a company was *not* taxed for a given year as that it should appear from such records why it *was* taxed for another year.

801. What Portion of the Capital Stock of Corporations Is Not Taxable.

The capital stock of corporations representing tangible property outside of Pennsylvania is not taxable. Com. *v.* Standard Oil Co., 101 Pa., 119; Com. *v.* Penna. Coal Co., 41 Leg. Int., 125; Com. *v.* Montg. Lead & Zinc M. Co., 5 Pa. C. C., 89. But such tangible personal property must be permanently located outside of the State; otherwise it is taxable. Com. *v.* Am. Dredging Co., 122 Pa., 386; Com. *v.* D., L. & W. R. Co., 206 Pa., 645 (1903); 1 Dau. Co. Rep., 153. The value of coal which a Pennsylvania mining company has on hand in other States, which was shipped thereto from Pennsylvania for the purpose of sale, cannot be deducted in determining the value of the capital stock of such corporation for purposes of taxation. Com. *v.* Pa. Coal Co., 197 Pa., 551 (1901). And it is immaterial that taxes were assessed and paid on the coal in the State where it was stored awaiting sale, if it does not appear whether such taxes were paid for State, local or municipal purposes, and it appears that they were paid without contest. Com. *v.* D., L. & W. R. R. Co., 206 Pa., 645 (1903). Mortgages held by a corporation for unpaid purchase moneys for properties sold in other States "represent and are but security for the debts or obligations held by the corporation, which are personal property and intangible things having as their situs the domicile of the owner and therein taxable." *Ibid.* Where property and assets of the trust department of a Mutual Insurance and Trust Company belong to the stockholders, and the property and assets of the insurance department thereof belong to the policy holders, and neither department is part of the other, the law will not permit the addition of the actual value of the assets of the insurance department to the actual value of the capital stock invested in the

trust business for purposes of taxation. Com. *v.* Provident Life and Trust Co., 9 D. R., 479 (1900).

802. Patent Rights.

Capital stock of corporations invested in patent rights granted by the United States is not taxable, but the capital must be invested in the right itself, and not in machinery for manufacturing under that right, nor in articles so manufactured, nor in permits to manufacture or rent, under that right. Com. *v.* Central D. & P. Telephone Co., 145 Pa., 121; Com. *v.* Edison Elec. Lt. Co., 145 Pa., 131; 157 Pa., 529; Com. *v.* Phila. Co., 157 Pa., 527; Com. *v.* Davis Colby Ore Roaster Co., 1 Dau. Co. Rep., 118.

803. United States Bonds.

Capital stock of corporations invested in United States bonds is not taxable. Com. *v.* Lack. I. & C. Co., 129 Pa., 346. The shares of stock of banks are taxable, however, even though the capital stock of the banks issuing the shares is wholly invested in United States bonds. The capital stock so invested cannot be taxed, but the shares of stock may be. Van Allen *v.* Assessor, 3 Wall., 573; Bank of Louisville *v.* Com. of Kentucky, 9 Wall., 353.

804. Building and Loan Associations.

The Act of May 22, 1883, P. L., 39, provides:

Mutual loan and building associations shall be exempt from the provisions of each and every law imposing taxes for State purposes on their capital stock or mortgages and other securities for moneys loaned to their members. . . . .

This provision relieves building and loan associations from making capital stock reports, and from the payment of capital stock tax. See Sec. 845 as to the taxation of matured shares of stock.

805. Foreign Telephone Companies.

A foreign telephone corporation leasing its machines to certain Pennsylvania companies, with the right to use them, the lessor retaining the property in them, was held not to be taxable in Pennsylvania on its capital stock invested in said telephones. The domestic companies carried on all the active business of telephonic communication, owned the lines and necessary apparatus, and maintained their offices and employed their own officers and

agents. There was a provision in the contract that, on the failure of the Pennsylvania companies to do certain things, the foreign company might operate the telephones, but, as a matter of fact, it never had done so. Com. *v.* Bell Telephone Co., 24 W. N. C., 187.

The facts in this case were so peculiar that the decision therein hardly establishes any general principle.

806. Manufacturing Corporations.

So much of the capital stock of corporations, limited partnership and joint-stock associations, organized for manufacturing purposes, as is invested in, and actually and exclusively employed in, carrying on manufacturing within the State (except companies engaged in brewing or distilling of spirits or malt liquors, and such as enjoy and exercise the right of eminent domain) is exempt from the tax on capital stock, but so much of the capital stock of said companies, so organized, "as may be invested in any property or business not strictly incident or appurtenant to its [their] manufacturing business" is subject to said tax.

To gain the benefit of this exemption a company must—

1. Be organized for manufacturing purposes; but it need not be organized *exclusively* for manufacturing purposes, as was required by the Acts of 1889 and 1891.

2. It must not be engaged in the brewing or distilling of spirits or malt liquors, nor can it enjoy and exercise the right of eminent domain, although it would seem that the mere possession of the power to exercise the right of eminent domain, without the actual exercise thereof, would not prevent a company from being entitled to the exemption. Com. *v.* Del. River Iron Ship Building and Engine Works, 2 Dau. Co. Rep., 232.

This exemption is not unconstitutional. Hawes Mfg. Co.'s Appeal, 1 Mona., 353; Fox's Appeal, 17 W. N. C., 449. Neither is the exemption unconstitutional because corporations engaged in the manufacture of spirituous or malt liquors, or having and enjoying the right of eminent domain, are excepted from its benefits. Com. *v.* Germania Brewing Company, 145 Pa., 83.

No corporation or limited partnership association organized for manufacturing purposes, whose manufacturing plant or plants, in whole or in part, are or may be leased to another corporation, limited partnership, individual or individuals, shall, by reason of such leasing, be deprived of the exemption from taxa-

tion upon its capital stock, or any part thereof, to which under existing laws it would be entitled if such lease had not been made. All acts or parts of acts inconsistent herewith are hereby repealed. Act of July 11, 1901, P. L., 668. See Com. *v.* Cambria Iron Co., 5 Dau. Co. Rep., 101 (1902).

807. What Companies Are and What Are Not Manufacturing Companies Within the Meaning of This Exemption.

Companies organized for the purpose of manufacturing steam and. supplying the same to buildings and real estate owned by them or not. Com. *v.* Arrott Mills Co., 145 Pa., 69. Neither are electric light companies. Com. *v.* Northern E. L. & P. Co., 145 Pa., 105; Com. *v.* Edison Elec. Lt. Co., 145 Pa., 131; Com. *v.* Edison Co., 170 Pa., 231; Com. *v.* Keystone L. H. & P. Co., 2 Dau. Co. Rep., 1; Com. *v.* U. S. Electric Lighting Co., 7 Pa. C. C., 90 (1889).

But companies engaged in refining crude petroleum are manufacturing companies within the meaning of the exemption. Com. *v.* Atlantic Refining Co., 2 Pa. C. C., 62. So are companies engaged in dyeing and finishing woollen and cotton goods. Com. *v.* Quaker City Dye Works, 5 Pa. C. C., 94. But a corporation engaged in the liberation of soiled particles from garments and other articles by washing, bleaching, coloring, starching, ironing and preparing them for use is not a manufacturing company. Com. *v.* Barnes Bro. Co., 5 Dau. Co. Rep., 75 (1902). Nor is a laundry company. Com. *v.* Keystone Laundry Co., 203 Pa., 289; 5 Dau. Co. Rep., 79 (1902). Artificial gas companies are manufacturing companies. Com. *v.* Allegheny Gas Co., 1 Dau. Co. Rep., 93; Com. *v.* Chester Gas Co., 5 Dau. Co. Rep., 121 (1902); and creamery companies.

Corporations organized for the purpose of publishing newspapers, and actually publishing them, are manufacturing corporations within the meaning of the act exempting such corporations from taxation, and so are publishing corporations of all kinds.*

*Com. *v.* J. B. Lippincott Co., 7 Dau. Co., 193 (1887). In the case of Com. *v.* D. B. Canfield Co., Limited, 7 Dau. Co., 195 (1890), it was held that a company not owning a printing office, but which prepared the copy for its periodical, and sent it to a printer to be printed and stereotyped, then sent the printed pages to a binder, with whom it had a separate contract, to be bound, and buying the paper on which the periodical was printed from a third party, was yet a manufacturing corporation within

The following kinds of business have been held to be manufacturing within the meaning of the statute by the Court of Common Pleas of Dauphin county:

Refining of crude petroleum and producing therefrom different kinds of oils and other articles.[18]

Preparing leaf tobacco for chewing and smoking.[19]

Building ships and engines, making castings, forgings and other machinery.[20]

Quarrying slate, splitting it and dressing it for roofing, and for school slates, door steps, lintels, hearths, blackboards, etc.[21]

Changing clay into brick by the ordinary processes of digging, tempering, moulding and burning.[22]

Tanning hides and the producing of sole leather therefrom.[23]

Converting coal into coke.[24]

Converting whole spices and mustard seed, by the use of proper machinery and appliances, into salable mustard, drugs, dyes, spices and condiments.[25]

The packing and provision business in which hogs are converted into loins, bellies, hams, sausages, etc.[26]

Printing and binding books.[27]

Preserving fruit.[28]

the meaning of the act exempting such corporations from tax upon their capital stock. This decision was so radical that the accounting officers have since admitted the right of all publishing corporations to such exemption. It has been held, however, that for purposes of local taxation the machinery used for printing and publishing a newspaper is not a "factory" nor a "manufactory," under the Act of April 15, 1834, Sec. 4, and April 29, 1844, Sec. 4. Wilkes-Barre *Times v.* City of Wilkes-Barre, 10 D. R., 691 (1901).

(18) Com. *v.* Chester Oil Co., 21 Aug. T., 1896; Com. *v.* Atlantic Refining Co., 7 Dau. Co., 189 (1886).

(19) Com. *v.* Clark & Snover Co., 18 June T., 1893.

(20) Com. *v.* Wm. Cramp & Sons' Ship & Engine Bldg. Co., 263, Sept. T., 1893.

(21) Com. *v.* East Bangor Consol. Slate Co., 158 Jan. T., 1887.

(22) Com. *v.* Excelsior Brick & Stone Co., 535 Jan. T., 1893.

(23) Com. *v.* Elk Tanning Co., 598 Com. Docket, 1896.

(24) Com. *v.* Hecla Coke Co., 490 June T., 1892.

(25) Com. *v.* A. Colburn Co., 306 Jan. T., 1892.

(26) Com. *v.* Penna. Packing Co., 3 Com. Docket, 1896; Com. *v.* Stowers Pork Packing and Provision Co., 566 Jan. T., (1892).

(27) Com. *v.* Lippincott Co., 60 Aug. T., 1886.

(28) Com. *v.* Ritter Conserve Co., 387 Aug. T., 1886.

Converting iron into steel.[29]
Converting iron ore into pig metal.[30]

808. What Capital Stock Is "Actually and Exclusively Employed in Manufacturing" Within the Exemption.

Dwelling houses rented to employes are not property actually and exclusively employed in manufacturing so as to entitle the capital stock invested therein to exemption. Com. *v.* Mahoning Rolling Mills, 129 Pa., 360 (1889). But otherwise, if there are no other means by which the operatives can be housed. The company must not, however, by the selection of the site for its plant, intentionally create the necessity for the erection of the houses, or the capital invested in them will be taxable. Com. *v.* Westinghouse Air Brake Co., 151 Pa., 276.

Capital invested in a coal mine by a manufacturing company is not "used in manufacturing," within the law, even though all the coal mined is used by the company in its manufacturing operations. Com. *v.* Lack. Iron & Coal Co., 129 Pa., 346; Com. *v.* Juniata Coke Co., 157 Pa., 507.

A corporation organized for the "mining of fire-clay and the manufacture of fire-brick, tiles and other articles made from fire-clay," which invests a portion of its capital in mining clay for its own use from land leased or owned by it, is taxable upon such portion of its capital as is so invested, but the remainder of its capital is exempt. Com. *v.* Savage Fire Brick Co., 157 Pa., 512.

A corporation organized for the purpose of "mining, quarrying, manufacturing, and selling slate and slate products," which invests a portion of its capital in mining slate for its own use, from its own land, is subject to taxation on such portion of its capital stock as is thus invested in mining, and also on the capital invested in the land not occupied by its manufacturing plant. Com. *v.* East Bangor Consol. Slate Co., 162 Pa., 599.

A coke company is taxable on so much of its capital stock as it may have invested in coal mines from which to supply its coke ovens. Com. *v.* Juniata Coke Co., 157 Pa., 507.

A limited partnership organized for the purpose of manufacturing refined oils from crude petroleum, and for the acquisition

(29) Com. *v.* Midvale Steel Co., 231 Aug. T., 1886.
(30) Com. *v.* Dunbar Furnace, 382 Jan. T., 1892. See note to Com. *v.* Allegheny Gas Company, 1 Dauphin Co., 93.

of the necessary lands, etc., is subject to taxation on the portion of its capital invested in mining and transporting crude petroleum. Com. *v.* National Oil Co., Lim., 157 Pa., 516.

The capital stock of a domestic manufacturing corporation invested in an office building located within the State, and used exclusively in the conduct of the business authorized by its charter, is exempt from taxation. A manufacturing company is not required to maintain its office at or near its factory. Com. *v.* Salt Mfg. Co., 1 Dau. Co. Rep. 97.

809. Foreign Manufacturing Corporations.

The status of foreign manufacturing corporations doing business within the State, in respect to exemption from taxation, is the same as that of domestic corporations. Com. *v.* American Car & Foundry Co., 203 Pa., 302 (1902); Com. *v.* Barnes Bros. Co., 26 Pa. C. C., 423; 5 Dau. Co. Rep., 75 (1902); Com. *v.* Alcott, Ross & Scully Co., 5 Dau. Co. Rep., 222 (1902). And a domestic manufacturing company, the stock of which is all owned by a foreign corporation, is not subjected to taxation upon so much of its capital as is invested in and actually and exclusively employed in carrying on manufacturing within the State, by such ownership. Com. *v.* American Cement Co., 203 Pa., 298 (1902); Com. *v.* Lorain Steel Co., 203 Pa., 300; 5 Dau. Co. Rep., 159 (1902).*

810. Distilling Companies.

As we have already seen, supra, companies organized and incorporated for the purpose of distilling liquors and selling the same at wholesale are made a separate class for purposes of taxation, and are taxed annually at the rate of ten mills upon the dollar of the actual value of their whole capital stock, by Act of July 15, 1897, Sec. 2, P. L., 294. The tax imposed is the general tax on capital stock, so that the only difference between the taxation of the capital stock of such companies and that of other corporations is, that tax is settled on their capital stock at the rate of ten mills instead of five.

*See Com. *v.* National Tube Works Co., 203 Pa., 310 (1902); Com. *v.* Amer. Steel & Wire Co., 203 Pa., 311 (1902); Com. *v.* Carbon Steel Co., 203 Pa., 312 (1902); Com. *v.* Ashley & Bailey Co., 203 Pa., 312 (1902); Com. *v.* Danville Bessemer Co., 203 Pa., 313 (1902).

811. Trust Companies.

By Act of June 13, 1907, P. L., 640, trust companies are made a separate object of taxation upon a basis approximating that on which banks are taxed. See Sec. 835.

812. Exemptions to Which Corporations Paying a Tax on Capital Stock Are Entitled.

1. Corporations paying a tax upon their capital stock, or expressly relieved from such payment—*i. e.*, manufacturing companies—thus relieve their shares of stock from taxation in the hands of the holders thereof. Sec. 1, Act of June 8, 1891.

2. "Corporations, limited partnerships, or joint-stock associations liable to tax on capital stock . . . . shall not be required to make any report or pay any further tax on the mortgages, bonds, and other securities owned by them in their own right." Sec. 1, Act of June 8, 1893. Com. *v.* Lehigh Coal and Navigation Co., 162 Pa., 603. But, under the amendment to said Act of 1893, of June 7, 1907, P. L., 430, corporations are exempt from further taxation, *i. e.*, from the State tax on personal property, only on such mortgages, bonds, etc., owned by them as the whole body of stockholders, or members as such, have the entire equitable interest in remainder, in, and must return all obligations not within such description to the local assessors, the same as individuals holding the same would be required to do. Such companies are, furthermore, taxable upon all such securities held by them "as trustees, executors, administrators, guardians, or in any other in (like) manner." Sec. 1, Act of June 8, 1893.

How far the above provision relating to the exemption of corporations from further taxation upon their bonds, mortgages, etc., applies to manufacturing corporations, it is not easy to state. Manufacturing corporations, of the classes entitled to exemption, are certainly "liable to tax on capital stock" on so much of their capital stock as "may be invested in any business or property not strictly incident or appurtenant to their manufacturing business," and hence it would seem that they should come, to a certain extent at least, within the provisions of Sec. 1 of the Act of 1893, quoted above in paragraph 2. On the other hand, they are not "liable to tax on capital stock" on so much of their capital as "is invested in and actually and exclusively employed in carrying on manufacturing within the State," and hence, to a certain extent also, they are *not* within the provisions of the law above referred to.

It was held in the case of Com. *v.* Westinghouse Air Brake Co., 151 Pa., 276 (1892), that so much of the capital stock of a manufacturing corporation as was invested in the shares of stock of other corporations was taxable.

In the case of Com. *v.* Fall Brook Coal Co., 156 Pa., 488 (1893), however, the Supreme Court held that—

"A tax upon the capital stock in the hands of a corporation and a tax upon the owners of the parts or shares into which the capital stock is divided, upon their respective holdings, is double taxation, and will not be supported, except by express enactment."

The court reconciled this holding with that in the Westinghouse case by stating, that in the former case it did not appear what the corporations were, in the shares of which a portion of the company's capital stock had been invested, nor whether such companies had paid tax upon their capital stock.

In the subsequent case of Com. *v.* United Gas Imp. Co., 162 Pa., 602 (1894), the Supreme Court held squarely that, "When a tax has been paid by a corporation upon its entire capital stock, the same stock cannot again be charged with taxes in the hands of the separate holders of the shares into which they may be divided, unless such double taxation is expressly authorized by statute." And it makes no difference who is the shareholder, whether a firm, limited partnership, or association. Com. *v.* Lehigh Coal & N. Co., 162 Pa., 603. The capital of a manufacturing corporation invested in trust certificates, representing shares of stock in other corporations, upon which capital stock tax has been paid, is not taxable. Com. *v.* Croft & Allen Co., 5 Dau. Co. Rep., 86 (1902); 26 Pa. C. C., 474. But capital of such a corporation invested in shares of stock in foreign corporations is taxable. Com. *v.* Bethlehem Iron Co., 5 Dau. Co. Rep., 118 (1902); and so is such capital invested in bonds of foreign and domestic corporations, and in goods, wares and merchandise manufactured by others. Com. *v.* Jarecki Mfg. Co., 204 Pa., 36 (1902).

From the foregoing it is evident that manufacturing corporations are entitled, equally with other companies, to exemption from tax on so much of their capital stock as is invested in the shares of domestic corporations paying a capital stock tax. But they are thus exempted, apparently, not under the provisions of the Act of 1893, but because to tax them on the capital invested in such shares would constitute a double taxation, which is not to be permitted except where expressly provided for.

It would seem evident that, if a manufacturing corporation is taxed upon so much of its capital as is invested in bonds, mortgages, etc., it should not be required to return those same obligations to the local assessors, for this would assuredly as much constitute "double taxation" as the taxation of the shares of a company, held by another corporation, after the capital stock of the corporation issuing the said shares has already been taxed, and we have just seen that *that* is held to be double taxation. There is certainly no express direction of law for such double taxation in the one case more than in the other, and without such express provision such double taxation is not permitted.

The fact is, that it is the practice of the Auditor General's Department to tax manufacturing corporations on the capital invested in the bonds, mortgages, etc., held by them. The capital stock report blank, prepared for the use of manufacturing corporations, and which calls for statements of all classes of property held to be taxable, as not being "actually and exclusively employed . . . . in manufacturing," contains the following paragraph:

"6. Personal property, such as bonds (except U. S. bonds), stocks, mortgages, and other securities. State in detail on Page 4."

In answer to which manufacturing corporations are required to state the amount of capital stock invested in the classes of property therein enumerated; and tax is settled on the amount thereof. The *stocks* required to be reported by said paragraph are those of companies not subject to the tax on capital stock, and those of foreign corporations.

It would seem, therefore, as though manufacturing companies, being taxed on so much of their capital as is invested in mortgages, bonds, etc., should be relieved from taxation on the bonds, mortgages, etc., in which that capital is invested. But the personal property return blank, which all taxables are required to fill out, contains the following paragraph:

"Manufacturing Companies. These companies are subject to the tax on personal property the same as individuals, and must make a return in the same manner, except those engaged in the brewing or distilling of spirituous or malt liquors, and such as enjoy and exercise the right of eminent domain. These companies [*i. e.,* brewing and distilling companies, etc.] are required to pay a capital stock tax direct to the State, and are not, therefore, required to pay any further tax upon personal property owned by them."

From the wording of this it would be inferred that manufacturing companies pay no capital stock tax whatever, unless engaged in brewing or distilling, or enjoying and exercising the right of eminent domain. But, as we have already seen, this is not the case.

In Com. *v.* I. P. Morris Company, 8 Dau. Co. Rep., 270 (1894), it was held that when a manufacturing company returned certain securities in which its capital stock was invested to the Board of Revision of Taxes of Philadelphia, and paid tax thereon, it could not be taxed by the State upon the capital invested in such securities, on the ground that though such return was irregular the State ultimately got the tax. This decision overlooks the fact that three-fourths of the personal property tax is returned to the counties, the State retaining but one-fourth, whereas the entire capital stock tax is kept by the State, so that in the case referred to the State lost three-fourths of the tax to which it was entitled.

The conclusion to be drawn from all the foregoing is, that if a manufacturing company knows that it has been taxed for a given year upon so much of its capital stock as is invested in bonds, mortgages, etc., it should refuse to return such bonds, mortgages, etc., to the local assessor, and, in the belief of the writer, it will win any litigation which may grow out of such refusal.

No deduction is permissible from the tax on capital stock for the portion of the year intervening between different payments on account of shares of stock which were outstanding during the whole tax year, but where shares are issued during the tax year, they are taxable only from the date of issue to the end of said year. Com. *v.* Union Traction Co. of Phila., 1 Dau. Co. Rep., 178. No deduction from tax on capital stock is permissible by reason of the fact that the company taxed leases the property of other corporations which pay a capital stock tax. *Ibid.*

813. Local Taxation.

By the payment of the tax on capital stock corporations do not relieve themselves from any local taxation to which they would otherwise be subject. We have already seen to what extent *public* corporations are exempt from such local taxation. The tax on personal property is not "local taxation" (see Wilkes-Barre Deposit & Savings Bank *v.* Wilkes-Barre, 148 Pa., 601); to what extent corporations paying tax on capital stock escape the tax on personal property has been already explained. Manufacturing cor-

porations, like other corporations, are still subject to taxation for county, borough, school, and township purposes. The Act of June 30, 1885, Sec. 20, exempting them from taxation does not abolish the tax upon the real estate of "manufactories of all descriptions" imposed by the Act of April 15, 1834. Hawes Mfg. Co.'s Appeal, 24 W. N. C., 302.

The tax on capital stock is a tax for State purposes only, so that local taxation upon the property in which the capital stock of a company is invested does not constitute double taxation. Com. *v.* Hillside Cem. Co., 170 Pa., 227.

814. Miscellaneous.

When the capital stock of a corporation has been increased during the course of a tax-year, the tax on the increase will be apportioned with regard to the length of time it has been in existence. Com. *v.* American Machine Co., 2 Chest. Co., 186; 2 Dau. Co. Rep., 27.

When the rate of capital stock tax is changed during a tax-year, a company is taxable at the old rate until the new goes into effect, and at the new rate for the balance of the tax-year. Ebervale Coal Co. *v.* Com., 91 Pa., 47; Com. *v.* Atlantic Refining Co., 7 Dau. Co. Rep., 189 (1886).

815. Apportionment of Capital Stock of Manufacturing Companies for Taxation.

Where a manufacturing corporation with a capital stock of, say one hundred thousand dollars, and possessing property to that value, has fifty thousand dollars thereof invested in property not actually used in manufacturing, and hence taxable, it is evident that such company will be taxed, if its capital stock is appraised at par, on fifty thousand dollars of such stock, and will be exempted from tax on the remainder thereof. But suppose that the stock of the company is appraised, and the appraisement is accepted, at but seventy-five thousand dollars. In such case, were tax to be settled on fifty thousand dollars of capital stock, two-thirds of the entire stock would be taxed, while in the former case but one-fourth would be taxed. An apportionment of the stock taxable, therefore, becomes necessary, which is made according to the following formula: As all the property of the company is to the amount of property not invested in manufacturing, so is the appraised value of the stock to the amount of stock taxable; or, to apply the proportion to the above case, as one hundred

thousand dollars is to fifty thousand dollars, so is seventy-five thousand dollars to thirty-seven thousand five hundred dollars, the proportion of stock taxable. Similar apportionments are made in all cases where any portion of the capital stock of a company is entitled to exemption from taxation, for any cause whatever, when the stock is appraised at less than par, and such appraisement is accepted. See Com. *v.* Lack. I. and C. Co., 129 Pa., 346; Com. *v.* Glendon Iron Co., Dau. C. P., No. 110, Mch. T., 1892. This method of apportionment is falling into desuetude, and the practice now is, generally, to settle upon the actual value of the property not entitled to exemption.

TAX ON CORPORATE LOANS.

816. Nature of the Tax.

The obligations of public or private corporations held by residents of Pennsylvania are subject to a tax of four mills on the dollar of the nominal value thereof, which tax is collected by the treasurers of the corporations issuing the obligations, by deducting the tax from the interest paid thereon. The holders of the obligations are then exempt from taxation thereon in their hands.

The State tax on corporate loans is identical in character with the State tax on personal property. In Commonwealth *v.* Lehigh Valley R. R. Co., 129 Pa., 429 (1889), the Supreme Court says:

"A careful examination and analysis of the provisions of the fourth section of the Act of 1885, that imposing a tax on the obligations of private corporations, is necessary to a clear understanding of the purpose of the Legislature. It will be observed that the tax, which the treasurer of the corporation is by this section authorized and directed to assess and collect, is 'the tax imposed and provided for State purposes;' that is to say, the tax which is imposed and provided by the first section of the same act, upon the general class of subjects, consisting of mortgages, money owing by solvent debtors, etc., at the rate of three mills on the dollar of the value thereof, annually. The effect of the fourth section . . . .· was to subdivide this general class into two particular classes, one embracing the debts of private corporations, to be taxed at the rate specified on their nominal value, the other embracing the residue of the general class. . . . . It is plain, then, that the tax in question, although rated on the nominal value, is 'the State tax imposed and provided on mortgages, money owing by solvent debtors,' etc."

817. Act Imposing the Tax.

Sec. 4, Act June 30, 1885, P. L., 194.[31] Hereafter it shall be the duty of the treasurer of each private corporation incorporated by or under the laws of this Commonwealth, or the laws of any other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath annually, on the first Monday of November, to the Auditor General, the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained, and it shall be his further duty to deduct three [four] mills on every dollar of the interest paid as aforesaid, and return the same into the State treasury within fifteen days after the thirty-first of December in each year, and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax, and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax in payment of said tax by a corporation; the bonds, certificates, or other evidence of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same.

The language of this section would seem to indicate that the tax was intended to be laid on the amount of interest paid, and not on the principal sum of the indebtedness, but the courts have uniformly held that the tax is to be collected on the nominal or par value of the principal sum of the indebtedness, and *not* on the amount of interest paid.

The rate of tax, as in the case of county and municipal loans, is fixed at four instead of three mills by the first section of the Act of 1891.

(31) The language of this section is broad enough to cover all corporations, whether for profit or not, but the practice is, not to require the treasurers of corporations not for profit to make reports or pay taxes under it. The obligations of such corporations are, therefore, taxable in the hands of the holders, and should be returned to the local assessor, and the treasurer of such companies should not deduct the State tax from the interest paid on such obligations. The same is true of the obligations of limited partnership associations.

The proviso to Sec. 2, of Act of June 1, 1889, P. L., 420, is as follows:

The taxable person, copartnership, unincorporated association, joint-stock association, limited partnership, corporation, or other person making the return aforesaid [return of personal property to the assessor for taxation] shall not include in said return the obligations of public or private corporations, the tax on which is required by law to be collected from the holder of such obligation and paid into the State treasury by the corporation, it being the true intent and meaning of this act that the provisions of law in force at the time of the passage of this act relating to the collection of the tax on such obligations shall remain unaffected by the present act.

818. Decisions.

The tax on the loans of private corporations is constitutional. Com. *v.* Lehigh Valley R. R. Co., 129 Pa., 429; Coal Ridge Imp. and Coal Co. *v.* Jennings, 127 Pa., 397; Com. *v.* Del. Division Canal Co., 123 Pa., 594.

The tax on corporate loans was not repealed by the Act of June 8, 1891. Com. *v.* Wilkes-Barre Railway Co., 29 Atl. Rep., 696.

Foreign corporations doing business in the State are required, equally with domestic companies, to report their loans held by residents of Pennsylvania, and to collect and pay the tax thereon. Com. *v.* Del. & H. Canal Co., 150 Pa., 245; Com. *v.* N. Y., L. E. & W. R. R. Co., 129 Pa., 463; 150 Pa., 234 and 145 Pa., 57.

The Supreme Court of the United States, however, in New York, Lake Erie & Western Railroad Company *v.* Commonwealth, 153 U. S., 628, held that the State of Pennsylvania could not "constitutionally impose upon the N. Y., L. E. & W. R. R. Co. the duty, when paying in the city of New York the interest due upon scrip, bonds, or certificates of indebtedness of that company held by residents of that State, of deducting from the interest so paid the amount assessed upon the bonds and moneyed capital in the hands of such residents."

As a matter of fact, the greater part of the foreign corporations doing business in Pennsylvania, which issue bonds, scrip, and certificates of indebtedness, are railroads or companies of a similar nature, and these almost all pay the interest on their obligations by cheques drawn in New York or some other place without the State. The difficulty of ascertaining when the interest on the ob-

ligations of foreign corporations doing business in Pennsylvania was paid without the State and when within, led for many years to the abandonment of all attempts to tax the obligations of such corporations through the treasurers of such companies and the relegation of such obligations to taxation in the hands of the domestic holders thereof, but the practice now is to require foreign corporations doing business within the State to make returns of their obligations, and where interest thereon is paid within the State to settle tax on so much thereof as is held by domestic holders.

Loans held by non-residents of Pennsylvania are not taxable.

It was originally held that corporations must prove affirmatively that their loans *were* held by non-residents, in order to entitle them to exemption. Com. *v.* Del. Div. Canal Co., 123 Pa., 594; Com. *v.* City of Chester, 123 Pa., 626; Com. *v.* Salt Company, 145 Pa., 53.

And that corporate loans would be assumed to be held by residents of Pennsylvania, in the absence of proof to the contrary. Com. *v.* Lehigh Valley R. R. Co., 129 Pa., 429. Though bonds issued to non-residents were held to be not taxable unless it were affirmatively shown that they belonged to residents of Pennsylvania. Com. *v.* N. Y., L. E. & W. R. R. Company, 9 Pa. C. C., 309.

It is now held, however, that there is no presumption that the bonds of domestic or Pennsylvania corporations are held by residents of the State. The tax on corporate loans is not, in any sense, a tax on the corporation or its property, but on the individual citizen of the State who holds its bonds. The corporation is chargeable with the tax only as a collector, and by reason of its default in the duty of collecting. The duty of the corporation is, to use diligence in ascertaining the residence of its bondholders, and whether it has, or has not, done so is a question of fact in each case, to be determined by the circumstances and the evidence. Com. *v.* Lehigh Valley R. Co., 186 Pa., 235 (1898).

The treasurer of a corporation must make due and diligent efforts to ascertain where the obligations of his company are held —that is, the residences of the holders thereof. Whether he does or does not make such proper effort is a question of fact to be determined, in the first instance by the Auditor General, and, afterward, if an appeal be taken to the Court of Common Pleas of Dauphin county, by that tribunal. If such treasurer is found to have made such proper and exhaustive effort, and is still unable to

ascertain the residences of the holders of the obligations of his company, the said obligations, so held by persons whose residences are unknown, will be exempted from taxation; but if he is *not* found to have made such proper effort, the said obligations, so held, will be taxed; the company being held for the tax, if it fails to collect the same as required by law. Com. *v.* People's Pass. Ry. Co., 183 Pa., 353 (1898); Com. *v.* Allentown Terminal R. R. Co., 2 Dau. Co. Rep., 81; Com. *v.* Lehigh Valley R. R. Co., 186 Pa., 235 (1898); Com. *v.* Manor Gas Coal Co., 186 Pa., 248 (1899); Com. *v.* Manor Gas Coal Co., 5 Dau. Co. Rep., 81 (1902).

It seems not to affect the matter, even though the Auditor General's Department may have ascertained the residences of some of the holders of the obligations returned as held by persons whose residence is unknown, and have ascertained that such residence is within the State. The fact that the Auditor General ascertained such facts does not prove that the treasurer of the company could, necessarily, have ascertained it, in the absence of proof to the contrary. Consequently, although the Auditor General may know that certain obligations are held by residents of Pennsylvania, tax cannot be settled against the company issuing the same, on account thereof, if the treasurer of the said company, in good faith, after a proper search, reports that said obligations are held by persons whose residences are unknown.

Where, however, a corporation agrees, on the issue of any obligations to "pay any and all sums assessed or to be assessed by the States of Maryland and Pennsylvania, or either of them, for State tax upon loan or interest, or any part thereof, when the same shall be payable by the holder or holders of interest coupons attached," or binds itself in like or similar manner to pay all State taxes that may be required of the holders of its obligations, the corporation must then pay tax on every bond that is within the power of the State, no matter whether its treasurer has been able to ascertain the residence of the holder thereof, or not. Com. *v.* Northern Cen. R'y Co., 2 Dau. Co. Rep., 67.

In this decision the court says:

"As we regard it, this appeal raises only one question that needs consideration: Does the defendant fulfil its covenant to pay the tax on these bonds, by making diligent inquiry concerning the residence of the bondholders? We have recently decided that such inquiry is the duty of the treasurer, and that the corporation is only liable if he is in default; but the decision does not apply to

a situation like this, where the corporation has expressly agreed to pay the tax upon its taxable obligations. As it seems to us, this agreement imposes the duty of paying the tax upon every bond that may be discovered to be taxable, whether the discovery be made by the corporation itself or by the Commonwealth. The defendant has undertaken not only to ascertain what bonds are taxable by the State of Pennsylvania, but also to pay the tax upon every bond that is within the power of the State. . . . . Diligence does not discharge its full contract obligation. . . . . When bonds are shown to be taxable, there is no answer except payment."

The fact that Sec. 4 of the Act of June 30, 1885, requires the treasurer of a corporation to assess the indebtedness of the company, will not prevent the accounting officers from correcting mistaken averments concerning the ownership of such evidences of indebtedness, and base their settlements for tax upon their more accurate information. Upon appeal, also, the court may hear evidence as to the ownership of the evidences of indebtedness of such corporation, and include in its judgment such as are properly taxable. Such action is not an assessment of indebtedness not previously assessed. Com. *v.* Northern Central Ry. Co., 2 Dau. Co. Rep., 64 (1899).

Corporations are liable for the payment of tax on their bonds held by other corporations or individuals of this State, in trust for persons whose residence is unknown. Com. *v.* North Pa. R. R. Co., 129 Pa., 460; Com. *v.* Lehigh Valley R. R. Co., 129 Pa., 429; Com. *v.* D., L. & W. R. R., 129 Pa., 458.

The tax on loans is a tax on the creditors of a company, and not on the company itself. Com. *v.* Lehigh Valley R. R., 104 Pa., 89.

But if the receiver of a company or its treasurer neglect to collect the tax on its obligations, in the manner prescribed by law, the company is responsible for the same. Com. *v.* Wilkes-Barre & S. R. R. Co., 162 Pa., 614; Com. *v.* P. & R. C. & I. Co., 162 Pa., 623; Com. *v.* People's Pass. Ry. Co., 183 Pa., 353.

Corporations are taxable, not only on the obligations originally issued by them, but also on those which have been issued by others but assumed by them. Such assumption, however, must be complete. For example, if a company purchase a property covered by a pre-existing mortgage, the company must, in order to be held responsible for tax on the mortgage, wholly assume the mort-

gage debt, so that it would be liable for any difference between the price which the property might bring, on the foreclosure of the mortgage, and the amount of the mortgage debt, if any such difference existed. Otherwise the mortgage should be returned by the mortgagee to the local assessor for taxation. Com. *v.* Hillside Coal & Iron Co., 1 D. R., 742; Com. *v.* J. Langdon & Co., 1 Dau. Co. Rep., 123; Com. *v.* Union Traction Co., 192 Pa., 507 (1899).

See, generally, as to the assumption of mortgages, Merriman *v.* Moore, 90 Pa., 78.

The Act of 1885, by fixing the first Monday of November as the date to which the report of loans should be made, would seem to contemplate that the tax-year for loans should end on that date; but the Supreme Court has held in Com. *v.* Lehigh V. R. R. Co., 129 Pa., 429, that the tax-year for loans is the calendar year, and therefore ends on December 31st of each year.

Money owing by a corporation upon articles of agreement for the sale of land is not such indebtedness as is contemplated in Sec. 4, Act of June 30, 1885, P. L., 193, but is taxable directly to the vendors of the land. Com. *v.* Penn Tanning Co., 2 Dau. Co. Rep., 55 (1899).

819. Corporate Loans Exempt from Taxation.

The following classes of corporate loans are not taxable:

1. Obligations held in their own right by corporations paying a tax on their capital stock when the whole body of stockholders, or members as such, have the entire equitable interest in such obligations in remainder. Proviso to Sec. 1, Act of June 7, 1907, P. L., 430.

2. Obligations held by National Banks. Also those held by State and Savings Banks. People's Savings Bank *v.* Monongahela River Consol. Coal & Coke Co., 29 Pa. Super. Ct., 153 (1905); Com. *v.* Clairton Steel Co., 11 Dau. Co. Rep., 25 (1908); Com. *v.* White Haven Water Co., 11 Dau. Co. Rep., 22 (1908).

3. Notes discounted or negotiated by banks, savings associations, or trust companies. See Sec. 1, Act June 8, 1891. But not notes discounted by private bankers or unincorporated banks. Com. *v.* McKean County, 200 Pa., 383 (1901).

4. Obligations held by non-residents of Pennsylvania in their own right. See State Tax on Foreign Held Bonds, 15 Wall., 326.

5. Obligations held and owned by institutions of purely public charity.

6. Obligations held and owned by building and loan associations, given them by members of their association. If given by persons not members of the association holding them, they are taxable. For the taxation of the shares of matured stock of said associations, see Sec. 845.

7. Obligations on which no interest has been paid or earned during the tax-year, from which the tax could have been deducted. Com. *v.* Phila. Traction Co., 1 Dau. Co. Rep., 117; Com. *v.* J. Langdon & Co., Incorp'd, 1 Dau. Co. Rep., 123; Com. *v.* P. N. & N. Y. R. R. Co., 13 Pa. C. C., 65.

All *other* obligations issued or assumed by private corporations are taxable under the provisions of the acts above quoted.

It should be noted that the obligations held by domestic corporations, which pay a capital stock tax, must be held in their own right, in order to be exempted from taxation. If held in trust, or as agent, attorney in fact, or in any other fiduciary capacity, for the use or benefit of another, such obligations are taxable, despite the fact that the companies holding them pay a capital stock tax.

Loans are taxable only for the portion of a tax-year during which they have been outstanding. Thus, if a company issue bonds on the first day of July, they will be taxed only for the six months of the tax-year during which they are outstanding, at the rate of four mills for the entire year.

The tax on loans being a tax on the money of the creditors of a company, invested in its obligations, and not on the company itself, it follows that manufacturing corporations are required, through their treasurers, to collect the tax on their obligations, in the same manner as other corporations.

Although the tax on corporate loans has been successfully collected for many years, many taxables persist in including in their returns of personal property, made to the local assessors, the "obligations of public or private corporations" held by them, in disobedience to the directions of the proviso to Sec. 1 of the Act of June 7, 1907, above quoted. This results in their being taxed twice on the same obligations; once through the collectors of the State tax on personal property, and once by the treasurer of the company issuing the obligations referred to, by deducting it from the interest paid thereon.

The only remedy that can be found in such a case is, to make application for exoneration to the proper board of county commissioners, before they have made their return of the personal property in their county subject to taxation, to the Board of Revenue Commissioners at Harrisburg. This return is usually made early in July of each year. Before it is made, the county commissioners can grant exoneration to the taxable, without any loss to the county or any one else. After the return of the county commissioners has been made to the Board of Revenue Commissioners, however, the exoneration can be granted only at the expense of the county, as the full amount of tax is required from the county on all the personal property returned by its commissioners as taxable.

The payment to the county authorities cannot be accepted by the State in lieu of the lawful payment through the treasurer of the corporations issuing the obligations, by deducting the tax from the interest paid on them, because, under the provisions of the Act of 1891, three-fourths of the State tax on personal property is returned to the counties collecting it. If, therefore, parties were allowed to pay the tax on the obligations of private or public corporations held and owned by them, to the local authorities, instead of permitting the tax thereon to be collected by being deducted from the interest paid them on such obligations, by the treasurers of the companies issuing them, the State would lose just three-fourths of the tax, whereas it is entitled to the whole amount thereof.

This being the case, it should be distinctly understood that if taxables include the obligations of public or private corporations in their returns made to the local assessors, this will not relieve them from the payment of the tax on the same obligations in the lawful manner, viz., by having the tax deducted from the interest paid them thereon; and, unless they can obtain exoneration from the proper county commissioners, they will thus be taxed twice on the same obligations.

Treasurers of corporations should also take notice that the fact that the holders of any of their obligations have returned the same to the local assessors with their other personal property, will not relieve such treasurers from the duty of collecting the tax on the same obligations in the manner prescribed by law, viz., by deducting it from the interest paid thereon.

Where no interest is paid, however, on corporate obligations,

and the taxable knows, when making his return of personal property to the local assessor, that no interest has or will be paid thereon during the tax-year for which he makes his said return, he should in that case *only,* include in such return of personal property the said obligations of private corporations, at their actual value, on which no interest has or will be paid. If there is, however, any doubt upon the question, he should not so return them.

820. Decisions.

Following are a number of decisions of the courts bearing upon different questions involved in the assessment and collection of the tax upon corporate loans:

Upon payment of interest for a portion of the year only, the tax will be apportioned. Com. *v.* P. & R. R. R. Co., 150 Pa., 312.

A full year's tax cannot be recovered upon bonds which have been in existence for only a portion of a year for which tax is charged. Com. *v.* Phila. Traction Co., 1 Dau. Co. Rep., 117.

When a corporation buys lands covered by mortgages, which it does not undertake to pay, but pays only the interest on the mortgage to protect its lands, the mortgages are not obligations of the corporation, but are taxable in the hands of the holders thereof. Com. *v.* Hillside Coal & Iron Co., 1 D. R., 742; Com. *v.* Union Traction Co., 192 Pa., 507 (1899).

Corporations are liable to collect tax upon their bonds held by other corporations, or individuals of this State, in trust for persons whose residences are unknown. Com. *v.* Lehigh Valley R. R. Co., 129 Pa., 429. Although originally issued by foreign corporations doing business in this State, and sold to non-residents. Com. *v.* N. Y., L. E. & W. R. R. Co., 150 Pa., 234.

When a non-resident testator gives the income of bonds of a Pennsylvania corporation to a trustee resident in Pennsylvania, for the benefit of a non-resident of Pennsylvania, the corporation has a right to retain the tax from the interest paid thereon, although the securities were kept outside of the State. Guthrie *v.* Pitts., Cin. & St. L. R. R. Co., 158 Pa., 433.

The tax on corporate bonds or loans imposed by the Act of June 30, 1885, is not a tax laid on the company, nor on the bondholders as a body, but on each resident bondholder, as an individual. Com. *v.* P. & R. R. R. Co., 150 Pa., 312. The corporation or its treasurer is merely the agent or instrument of collection, for the

convenience of the State. *Ibid.* A solvent corporation, it seems, may not pay its interest in stock or scrip or other equivalent of money, and therefore escape the payment of the tax, but an insolvent one may. *Ibid.*

A company in the hands of a receiver is liable to the Commonwealth for the tax on loans provided by the Act of 1885, the interest on which is paid by the receiver. It is the duty of the treasurer of a company in the hands of a receiver to assess the State tax on its indebtedness, and the duty of the receiver to pay it. In case of failure to perform this, the company is liable. Com. *v.* Phila. & Reading Coal and Iron Co., 26 W. N. C., 455; 137 Pa., 481.

Corporations are not liable for the tax on corporate loans on promissory notes given for current indebtedness. Com. *v.* Manor Gas Coal Co., 5 Dau. Co. Rep., 81 (1902).

Three street railway companies, contemplating a lease of their lines to a fourth company, had their stockholders deposit their stock with a trustee, who issued to the stockholders trust certificates. Subsequently leases were executed under which the lessee company agreed to pay as rental a net sum equal to a certain per cent. upon the amount of such certificates. These rentals were paid over to the lessor companies, and by them paid to the trustee, who, in turn, paid them, in the form of interest upon the stock certificates to the holders of such certificates. Held, that the lessor company was not subject to the tax on corporate loans on such certificates. Com. *v.* Union Traction Co., 192 Pa., 507 (1899).

821. Reports and Assessments of Corporate Loans.

Blanks upon which to make reports of corporate loans are sent to the treasurers of all corporations subject to the tax, by the Auditor General, about the first of November of each year. As already above stated the tax-year for the loan tax does not expire, under the decisions of the courts, until December 31st in each year. The tax-year for capital stock, however, ends on the first Monday of November in each year, and as capital stock report blanks have to be sent out at or near that time, and as all domestic companies subject to the capital stock tax (except limited partnership and joint-stock associations) also pay the tax on loans, it is more convenient to send the loan tax blanks with, and at the same time, as the capital stock report blanks.

Reports of loans must be made by a company, for each year,

whether it has any loans outstanding for such year or not. If it has none, the treasurer thereof should so report, under oath, on the blank, it being as necessary that the records of the Auditor General's Department should show why a company is *not* taxed on loans for a given year as that it should appear therefrom why it is taxed for another year.

The fourth section of the Act of June 30, 1885, provides, as we have seen, that the treasurer of every private corporation shall "assess the tax . . . . upon the nominal value of each and every said evidence of debt." That is, he is to determine the value thereof, and in so doing he shall determine such value to be the nominal value of the same; which is an odd kind of "assessment." The provision was inserted in the act, however, to meet the objections of the Supreme Court to the loan tax provisions of the previous Acts of 1879 and 1881. In fact, all that the treasurer of a company has to do is to return the obligations of his company, giving the face value thereof, instead of the actual value.

Upon the return of the reports to the Auditor General's Department, settlements are made on the basis thereof, and copies of the settlements are mailed to the treasurers of the companies so reporting. A company can appeal from such settlement at any time within sixty days after the receipt of the copy of the settlement. Failing to do this within said time, the settlement becomes final. Payment of the tax is not demanded until the said sixty days have expired.

Before paying any interest on the outstanding obligations of a corporation its treasurer should classify such obligations in the following manner:

1. All held by non-residents of Pennsylvania.

2. Those held by corporations of Pennsylvania, *in their own right,* which pay a capital stock tax.

3. Those held by National, State and Savings banks.*

*The Auditor General's Department has not admitted that obligations held by state and savings banks are exempt from taxation, although it has been so held in People's Savings Bank *v.* Monongahela River Consol. Coal & Coke Co., 29 Pa. Super. Ct., 153 (1905), and appeals from settlements involving this question have recently been decided by the Court of Common Pleas of Dauphin County, in the cases of Com. *v.* Clairton Steel Co., 11 Dau. Co. Rep., 25 (1908), and Com. *v.* White Haven Water Co., 11 Dau. Co. Rep., 22 (1908), the same way.

4. Notes discounted or negotiated by banks, savings institutions, or trust companies, but not those discounted by private bankers or unincorporated banks. Com. *v.* McKean County, 200 Pa., 383 (1901).

5. Those held by "institutions of purely public charity." Whether or not a given institution *is* an institution of purely public charity is not always easy of ascertainment.

6. Obligations held by building and loan associations of which the company issuing the obligations is a member. If the said company is not a member of such institution, the obligations held by it are taxable.

7. Obligations held by corporations, banks, or individuals, in trust for others, or in any fiduciary capacity.

8. Those held by individual residents of Pennsylvania.

9. Those held by persons whose residences cannot be ascertained after a careful and rigorous search.

Having made this classification, the treasurer of such corporation should deduct from the interest paid on the obligations enumerated in Numbers 7 and 8, and from those included in the exceptions to the other numbers, the tax of four mills on the dollar of the nominal, or face, value of such obligations. From the interest paid on the other obligations he will deduct nothing. This tax, so collected, can be paid immediately to the State Treasurer, but the better way is to hold it until the company has made its reports of loans, and has received a copy of the settlement for tax made thereon, when the tax should be remitted to the State Treasurer, although the company may delay until sixty days from the receipt of said copy before remitting the tax.

In making the report of a company on its loans, the treasurer will find the classification above mentioned enable him to fill out the blank sent him, with little difficulty. Where there are any unusual circumstances relating to a given loan, it is well to add a note to the report, fully setting forth these peculiarities.

In remitting the tax on loans, treasurers should not neglect to deduct their commissions for collecting the same, which is five per cent. on the first thousand dollars of tax, one per cent. on the second thousand dollars of tax, and one-half of one per cent. on all tax in excess of two thousand dollars; thus the commission on a tax of two thousand five hundred dollars would be fifty dollars plus ten dollars, plus two dollars and a half, or sixty-two and one-

half dollars. They will find this commission already deducted for them, from the gross tax, in the copy of settlement sent them.

TAX ON GROSS RECEIPTS.

822. What Classes of Corporations Are Subject to the Tax.

All transportation and transmission companies of every description are subject to a tax of eight mills on the dollar of their gross receipts derived from passengers and freight traffic transported wholly within the State, and from telegraph, telephone, and express business done wholly within the State, and all electric light companies are subject to a like tax upon their gross receipts derived "from business of electric light companies."

823. Act Imposing the Tax.

The Act of June 1, 1889, Sec. 23, P. L., 420, is as follows:

Every railroad company, pipe-line company, conduit company, steamboat company, canal company, slack water navigation company, transportation company, street passenger railway company, and every other company, joint-stock association, or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning, operating, or leasing to or from another corporation, company, association, joint-stock association, or limited partnership, any railroad, pipe-line, slack water navigation, street passenger railway, canal, or other device for the transportation of freight or passengers or oil, and every telephone or telegraph company incorporated under the laws of this or any other State or of the United States and doing business in this Commonwealth, and every express company, incorporated or unincorporated, doing business in this Commonwealth, and every firm, copartnership, or joint-stock company or association doing express business in this Commonwealth, and every electric light company and every palace car and sleeping car company, incorporated or unincorporated, doing business in this Commonwealth, shall pay to the State Treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation, company or association, limited partnership, firm or copartnership, received from passengers and freight traffic transported wholly within this State, and from telegraph, telephone, or express business done wholly within this

State, or from business of electric light companies, and from the transportation of oil done wholly within the State; the said tax shall be paid semi-annually upon the last days of January and July in each year; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, firm, copartnership, limited partnership, joint-stock association, or corporation, to transmit to the Auditor General a statement, under oath or affirmation, of the amount of gross receipts of the said companies, copartnerships, corporations, joint-stock associations, or limited partnerships derived from all sources, and of gross receipts from business done wholly within the State, during the preceding six months ending on the first days of January and July in each year; and if any such company, firm, copartnership, joint-stock association, association, or limited partnership or corporation shall neglect or refuse, for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law: *Provided,* That in any case where the works of one corporation, company, joint-stock association, or limited partnership are leased to and operated by another corporation, company, association, or limited partnership the taxes imposed by this section shall be apportioned between the said corporations, companies, associations, or limited partnerships in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, association, or limited partnership operating the works, and upon payment by the said company, corporation, association, or limited partnership of a tax upon the receipts as herein provided derived from the operation thereof, the corporation, company, joint-stock association, or limited partnership from which the said works are leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works.

824. What the Tax Is.

It is probable that the tax is a franchise tax, measured by the amounts of the gross receipts of the companies subject thereto.

The Supreme Court of the United States, in P. & R. R. R. Co. *v.* Com., 15 Wall., 284, intimates that this may be the case, and similar taxes in other States have been directly ruled to be fran-

chise taxes, notably in Maryland, where it was held in State *v.* Phila., etc., R. R. Co., 48 Md., 49, that a similar tax was not upon property, but "a tax upon the franchise of the corporation, measured by its business." What is the tax on gross receipts but a tax on the income, derived from certain sources, of the corporations subject to it? "Income is not property, but the fruit of property, and an income tax is not a tax on property." Waring *v.* Savannah, 60 Ga., 93. It is proper to say, however, that some decisions in this State, involving the question of the taxation of gross receipts derived from inter-state commerce, seem to regard the tax as if it were upon property. If it be a tax on property it certainly constitutes double taxation, since the capital stock of a corporation, which, as we have seen, represents its property, assets, and the value of its franchise, is already taxed, and the gross receipts of the company, which, as the Supreme Court say in Phila. & Reading R. R. Company *v.* Com., supra, are not taxed until they have been incorporated "in the general mass of the company's property," certainly enter into the value of that capital stock; and double taxation cannot be imposed except by express legislation.[33] If the tax be considered as a franchise tax, we escape the conclusion to which the other contention necessarily leads.

The tax was first laid on the business of electric light companies by the Act of June 1, 1889, having been limited in its application in previous acts to transportation and transmission companies only. Receipts of an electric light company derived from the sale of steam, electric power and supplies and scrap and other material are taxable. Commonwealth *v.* Brush Elec. Lt. Co., 204 Pa., 249 (1902).

825. Decisions Relative to the Tax.

The tax on gross receipts, as imposed by the earlier acts, was declared constitutional in the case of State Tax on Gross Receipts, 15 Wall., 284. After the re-enactment of the tax by the Act of March 20, 1877, P. L., 6, the constitutional right of the State to tax so much of the gross receipts of transportation and transmission companies as was derived from inter-state commerce, became the subject of litigation, and it was held in the case of Com. *v.* Phila. & Southern S. S. Co., 122 U. S., 326, that such receipts could not be taxed, reversing the Supreme

(33) Com. *v.* Lehigh Coal & Nav. Co., 162 Pa., 603; Tenn. *v.* Whitworth, 117 U. S., 129: Taylor on Corpns., 4th Ed., 467-8.

Court of this State. The act now in force was prepared with an especial view toward making the same in conformity with the inter-state commerce clause of the Constitution of the United States, and the decisions construing the same.

Foreign corporations are taxable, equally with domestic companies, upon their gross receipts derived from transportation done wholly within the State. Otherwise as to receipts derived from transportation between points without and points within the State. Com. *v.* Del. & Hud. Canal Co., 21 W. N. C., 406.

But receipts derived from the transportation of goods or passengers from one point in Pennsylvania, through another State, to another point in Pennsylvania, are taxable. Com. *v.* Lehigh Valley R. R. Co., 129 Pa., 308; Com. *v.* N. Y., L. E. & W. R. R. Co., 21 W. N. C., 410.

Telegraph companies are liable to tax only on gross receipts derived from messages transmitted wholly within the State. Western Union Tel. Co. *v.* Pa., 128 U. S., 39.

Express companies employing railroad and other companies to do their transportation are not entitled to exemption on the amount of their receipts paid for such services, even though the payments enter into the amounts upon which the other companies have paid tax, for they do not operate them under lease. Com. *v.* U. S. Express Co., 157 Pa., 579.

"Moneys received by a railroad company for the use of its track by the trains of another company, in common with its own trains, computed at the rate of so much for each ton of freight and for each passenger carried, are not rents, or receipts from passengers and freight traffic, but receipts for tolls.

"Such tolls are not included within the gross receipts taxable under the twenty-third section of the Act of June 1, 1889, imposing a tax upon the gross receipts 'from passengers and freight traffic transported within the State' of every railroad company owning, operating, or leasing any railroad.

"Construed in the light of preceding legislation, and of the fact that the well-defined word 'tolls' appearing in prior taxing statutes was omitted from the Act of 1889, the words employed in that act apply only to receipts for carriage done by the company taxed, or by a company operating its works under lease." Com. *v.* N. Y., L. E. & W. R. R. Co., 145 Pa., 200.

Electric light, heat and power companies are taxable not only upon their receipts derived from furnishing electric light, but upon

all their receipts whatever, except such as may not result from the sales of the product of such companies. Thus, receipts from the furnishing of electric power, sale of steam, electric supplies, scrap, etc., are taxable. Com. *v.* New Castle Electric Co., and other Companies, 5 Dau. Co. Rep., 89 (1902).

826. What Receipts Are Not Taxable.

Receipts derived from the transportation of United States mails are not taxable. Com. *v.* Del., Lack. & W. R. R. Co., 21 W. N. C., 412.

Neither are receipts from tolls, the word "tolls" contained in former acts relative to the gross receipts tax having been omitted from the Act of 1889. Com. *v.* N. Y., L. E. & W. R. R. Co., 145 Pa., 200; Com. *v.* N. Y., P. & O. R. R. Co., 145 Pa., 38. See supra.

It will be observed that the gross receipts taxable are limited by the act heretofore quoted to those "received from passengers and freight traffic . . . . and from telegraph, telephone, or express business . . . . or from business of electric light companies."

The receipts derived from the rentals of a railroad company cannot, therefore, be taxed.

The gross receipts of a ferry company operating between two States cannot be taxed by State authorities. Gloucester Ferry Co. *v.* Com., 114 U. S., 218.

827. Companies in Hands of Receivers.

The fact that a company is in the hands of a receiver appointed by a United States court does not relieve it from the tax, although assessed in the name of the corporation alone. Phila. & Reading Railway Co. *v.* Com., 104 Pa., 80; 13 W. N. C., 478; Com. *v.* Buffalo, New York & Phila. R. Co., 2 Dau. Co. Rep., 216 (1888).

828. Reports.

Blanks upon which to make reports of gross receipts are sent semi-annually to the treasurers of the corporations subject to the tax, on or about the 30th of June and the 31st of December in each year. The reports are required to be made and filed within thirty days from said June 30th and December 31st, respectively. The act requires that the tax shall be paid semi-annually upon the last days of January and July in each year, and if the report is not made "for a period of thirty days after such tax becomes due"—

that is, within thirty days from the last days of July and January, in each year, respectively—"the amount thereof, with an addition of ten per cent. thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law."

According to the foregoing, a corporation need not make its report until thirty days after the tax becomes due. The reports are to be made for the periods ending June 30th and December 31st, respectively; the tax is due on the last days of July and January, respectively, and no penalty for neglect to report can be imposed until September 1st and March 1st. The practice is, however, to require the reports to be made by July 30th and January 31st in each year, and not to require payment of the tax until settlements therefor have been made, and the usual period for taking an appeal has expired.

In default of reports, estimated settlements, with fifty per centum penalty, may be made under the Act of March 30, 1811.

Companies whose roads, lines, or works are leased to and operated by other companies will, nevertheless, continue to make regular semi-annual reports, which should set forth substantially as follows:

"The A. B. Company has leased its road (lines or works) to the C. D. Company for the term of years, and its gross receipts for the six months ended are included in the gross receipts of the said C. D. Company, as set forth in its report of gross receipts for the said period."

Such reports show why no tax is settled against the company for the period for which it is leased, and indicate to the accounting officers the continuance of the lease, as well as show when it terminates.

829. Pullman's Palace Car Company and Similar Corporations.

Pullman's Palace Car Company and similar corporations are taxed under the general laws of Pennsylvania as required by the State Constitution, and not by special laws, as is the case in many States. The proportion of the capital stock of Pullman's Palace Car Company subject to the tax on capital stock in Pennsylvania is ascertained in the following manner:

"The mode which the State of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that State was, by taking as a basis of assess-

ment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more." Pullman's P. Car Co. *v.* Penna., 141 U. S., 18. The court therefore sustained this method of taxing the capital stock of the company. See also Com. *v.* Pullman's P. C. Co., 13 Pa. C. C., 54.

The gross receipts of the said company are taxed as follows: The company reports all the moneys received for transportation between places in Pennsylvania and other places in the same State. It returns separately, or in different schedules, the receipts of this nature earned by cars running wholly within the State, and, in another schedule, such receipts as are earned by cars whose trips are not confined to the State, but are continued beyond the borders of Pennsylvania, or, beginning without the State, pass through or terminate in it. The tax on gross receipts is settled upon the full amount of receipts, earned wholly in Pennsylvania, so returned, whether earned by cars running only within the State, or by those engaged in inter-state commerce. So long as the traffic is carried on entirely within the State, it makes no difference whether the cars earning the receipts are engaged in inter-state commerce or run only within the State. The fact that a car runs between States does not make so much of the traffic carried on by it as is limited to the territory of a given State, inter-state traffic.

The above method of taxing this company has appeared to work very equitably, and, having been adjudicated, may now be considered as firmly and finally established, so long as there is no change in our tax system.

830. Extra Tax on Gross Receipts of Express Companies.

By the Act of July 15, 1897, P. L., 294, a tax was imposed upon the gross receipts of express companies, in addition to the tax on gross receipts which they already paid in common with other transportation companies. This additional tax was repealed by Act of April 28, 1899, Sec. 2, P. L., 72, the language of which act carefully conceals the fact that it repeals, instead of imposes, a tax.

The Act of July 15, 1897, referred to, was supposed to be a "strike," which by some oversight became a law.

TAX ON BANK STOCK.

831. Nature of the Tax.

Every bank or savings institution, having capital stock, in the Commonwealth of Pennsylvania, incorporated under the laws of said State (or of the United States, and located in Pennsylvania), must make a sworn report in writing to the Auditor General, under the oath of one of its sworn officers, on or before the twentieth day of June in each year, which report shall state:

(*a*) The full number of shares of capital stock subscribed for or issued by such bank or savings institution, and

(*b*) The actual value thereof; and the actual value of the shares shall be ascertained by adding together the amount of

(*a*) Capital stock paid in, and

(*b*) The surplus and undivided profits, and dividing the amount by the number of shares.

The Auditor General then assesses tax on said shares at the rate of four mills on the dollar of their actual value, ascertained as above, and transmits a copy of the assessment or settlement to one of the officers of the bank. It is then the duty of such officers to post the settlement in a conspicuous place in their bank or savings institution, so as to give notice to the stockholders of such valuation and settlement. The bank or savings institution may then, within forty days from receipt of copy of settlement, either collect the tax from its shareholders, or pay it out of the general fund.

Any bank or savings institution subject to the tax may, however, elect to collect annually from its shareholders a tax of four mills on the dollar of the actual value of all its shares of capital stock (computed as above stated), and pay the same into the State treasury on or before March 1st in each year, and may thus secure the exemption from local taxation of its shares and so much of its capital and profits as may not be invested in real estate, and such bank will not then be required to make any return to the local assessors of its personal property owned in its own right for purposes of taxation, and shall not be required to pay any tax thereon.

Any such bank or savings institution may elect, in lieu of the

method hereinbefore set forth for ascertaining the value of its shares, to collect annually from its stockholders a tax of ten mills upon the par value of all its shares, which have been subscribed for or issued, and pay the same into the State treasury before the first day of March in each year, and in such case the shares of such bank or savings institution and so much of its profits and capital as shall not be invested in real estate shall be exempt from local taxation under the laws of this Commonwealth.

832. Act Imposing the Tax.

The Act of July 15, 1897, P. L., 292, provides as follows:

From and after the passage of this act every bank or savings institution having capital stock, incorporated by or under any law of this Commonwealth, or under any law of the United States, and located within this Commonwealth, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, cashier, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such bank or savings institution, and the actual value thereof, which shall be ascertained as hereinbefore [hereafter] provided; whereupon it shall be the duty of the Auditor General to assess such shares for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of the State; that is to say, at the rate of four mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. The Auditor General shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report as made by the officers of any bank or savings institution, to summon the officers of said bank or savings institution to appear before him, upon notice to do so, on a day to be fixed by him, and to bring with them the books of said bank or savings institution for his examination; and he shall have the right to have further evidence to satisfy himself as to the correctness of the report made to him on the question of the value of the shares of stock of such bank or savings institution, according to the rule hereinbefore stated. After the Auditor General shall have fixed the value of the shares of stock in any bank or savings institution by the method hereinbefore provided,

and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such bank or savings institution a copy of such settlement, showing the valuation and assessment so made by him, and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, cashier, or treasurer of any such bank or savings institution, immediately upon receipt of said settlement, to post the same in a conspicuous place in such bank or savings institution, so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of the valuation of such shares of stock at the Auditor General's office within a period of thirty days from the date of said settlement. It shall be the duty of every bank or savings institution, within a period of forty days after the date of such settlement by the Auditor General, at its option, to pay the amount of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and to pay over to the State Treasurer: *Provided,* That if any such bank or savings institution shall fail or refuse to make such report, or to pay such tax at the time herein specified, or shall make any false statement in such report, or shall fail or refuse by its officers to appear before the Auditor General upon notice as aforesaid, or shall fail or refuse to produce its books for examination when required to do so by the Auditor General, he shall, after having ascertained the actual value of each share of the capital stock of such bank or savings institution from the best information he can obtain, add thereto fifty per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such bank or savings institution: *Provided, further,* That if the president, cashier, or treasurer of any such bank or savings institution shall neglect or refuse to post the copy of the settlement in a conspicuous place in such bank or savings institution immediately upon the receipt of the same, so as to give notice to the shareholders, such president, cashier, or treasurer shall be adjudged to be in default, and as a penalty for such default such bank or savings institution shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such bank or savings institution: *And provided further,* That in case any bank or savings institution having capital stock, incorporated under the law of this State or of the United States, shall collect annually from the shareholders thereof said tax of four mills on

the dollar upon the actual value of all the shares of stock of said bank or savings institution, according to the rule hereinbefore stated, that have been subscribed for or issued, and pay the same into the State treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate shall be exempt from local taxation under the laws of this Commonwealth; and such bank or savings institution shall not be required to make any report to the local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon. Except, however, that any bank or savings institution incorporated as aforesaid, in lieu of the method hereinbefore set out for ascertaining the actual value of the shares of capital stock thereof, may elect to collect annually from the stockholders thereof a tax of ten mills on the dollar upon the par value of all shares of said bank that have been subscribed for or issued, and pay the same into the State treasury on or before the first day of March in each year; and the shares of such bank or savings institution, and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempted from local taxation under the laws of this Commonwealth.

833. Bonds, Mortgages, Etc., Held by Banks.

Under the provisions of the Act of July 15, 1897, the shares of stock of banks are not subject to the State tax on personal property, in the hands of their holders, and they should not, therefore, be returned by such holders, to the local assessors. The tax on such shares is either paid by the bank, out of its general fund—which is the usual practice—or the bank collects the tax from the shareholders and pays the same to the State Treasurer. The tax is settled against the bank and not against the stockholder, in either case.

By collecting and paying the four-mill tax on or before March 1st in each year, State and savings banks relieve themselves from liability to the payment of the State tax upon personal property upon the bonds, judgments, mortgages, etc., and other taxable personal property held by them in their own right, whether such obligations be issued by corporations or individuals. Peoples Savings Bank *v.* Monongahela River Consol. Coal and Coke Co., 29 Pa., Super. Ct., 153 (1905); Com. *v.* Clairton Steel Co., 11

Dau. Co. Rep., 25 (1908); Com. *v.* White Haven Water Co., 11 Dau. Co. Rep., 22 (1908). National banks are exempt from such tax, in any case being taxable only upon their shares. State and savings banks electing to pay and paying the ten-mill tax, are exempted from making any return of the obligations held by them to the local assessors, and are equally exempt with banks paying the four-mill tax from other taxation on corporate obligations held by them. Com. *v.* White Haven Water Co., Dau Co. C. P., 398 Com. Dok't., 1906.

Banks which do not collect and pay the tax on or before March 1st of each year are unquestionably subject to taxation on the personal property held by them, except in the case of National banks, which cannot be taxed, under the National Banking Laws, except upon their shares.

See Gorly *v.* Bowlby, 8 Pa. C. C., 17.

CAPITAL STOCK OF BANKS INVESTED IN UNITED STATES BONDS.

"The shareholders of a bank may be taxed by the States on shares so held by them, although all the capital of the bank may be invested in Federal securities." Bank of Louisville *v.* Com. of Kentucky, 9 Wall., 353.

It seems, however, that the capital stock itself, when so invested in United States bonds, cannot be taxed. See Van Allen *v.* Assessor, 3 Wall., 573.

SHARES OF NATIONAL BANKS LOCATED IN OTHER STATES.

The shares of National banks located in other States, owned by residents of this State, are not taxable in Pennsylvania. Tappan *v.* Merchants' National Bank, 22 Wall., 490.

834. Reports and Settlements.

Blanks upon which to make reports of bank stock are sent by the Auditor General to each bank some time in January. Two blanks are sent, one for use by the bank in case it elects to pay the ten-mill tax on the par value of its shares, the other for use in case it chooses to pay the four-mill tax on the actual value of such shares. It is evident that whenever the actual value of the capital stock, surplus and undivided profits of a bank exceeds two and one-half times par it will be to the advantage of that bank to

elect to pay and to pay the ten mill tax; otherwise it will gain by paying the four-mill tax.

The officers of the bank fill in the amount of paid-in capital, the amount of their surplus and of their undivided profits, and return the report to the Auditor General, after making oath to the same. The accounting officers make a statement or settlement of the tax, which is sent to the bank, which remits the amount thereof.

Inasmuch as the basis of assessment is fixed, absolutely, by the act, few questions arise in the collection of the tax on bank stock, and those which are raised relate mainly to what may be charged off from the books of a bank on account of bad debts, etc.

835. Tax on Trust Companies.

Trust companies which, until the passage of the Act of June 13, 1907, P. L., 640, were subject to the tax on capital stock, are now taxable under the provisions of said act as follows:

From and after the passage of this act, every company incorporated under the provisions of section twenty-nine of an act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April twenty-ninth, one thousand eight hundred and seventy-four, and its supplements; for the insurance of owners of real estate, mortgages, and others interested in real estate, from loss by reason of defective titles, liens, and incumbrances; and every company entitled to benefits of, and every company having any of the powers of, companies entitled to the benefits of an act, entitled "An act conferring upon certain fidelity, insurance, safety deposit, trust, and savings companies the powers and privileges of companies incorporated under the provisions of section twenty-nine of an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved April twenty-ninth, Anno Domini one thousand eight hundred and seventy-four, and of the supplements thereto," approved June twenty-seventh, one thousand eight hundred and ninety-five, commonly known as title insurance, or trust, companies, shall, on or before the twentieth day of June in each and every year, make to the Auditor General a report in writing, verified by the oath or affirmation of the president, secretary, or treasurer, setting forth the full number of shares of the capital stock subscribed for or issued by such company, and the actual value thereof, which shall be ascertained as hereinafter provided; and

thereupon it shall be the duty of the Auditor General to assess such shares for taxation at the rate of five mills upon each dollar of the actual value thereof, the actual value of each share of stock to be ascertained and fixed by adding together the amount of capital stock paid in, the surplus and undivided profits, and dividing this amount by the number of shares. The Auditor General shall have the power, and it shall be his duty, in case he shall not be satisfied with the correctness of the report as made by the officers of any such company, to summon the officers of said company to appear before him, upon notice to do so, on a day to be fixed by him, and to bring with them the books of said company for his examination; and he shall have the right to have further evidence to satisfy himself of the correctness of the report made to him on the question of the value of the shares of stock of such company, according to the rule hereinbefore stated. After the Auditor General shall have fixed the value of the shares of stock in any such company by the method hereinbefore provided, and settled an account according to law, he shall thereupon transmit to the president, cashier, or treasurer of such company a copy of such settlement, showing the valuation and assessment so made by him and the amount of tax due the Commonwealth on all such shares. And it shall be the duty of the president, secretary, or treasurer of any such company, immediately upon the receipt of said settlement, to post the same in a conspicuous place in such company's place of business, so as to give notice to the shareholders of such valuation; and it shall be the duty of the Auditor General to hear any shareholder upon the subject of the valuation of such shares of stock, at the Auditor General's office, within a period of thirty days from the date of said settlement. It shall be the duty of every such company, within a period of forty days after the date of such settlement by the Auditor General, at its option to pay the amount of said tax to the State Treasurer from its general fund, or collect the same from its shareholders and pay over to the State Treasurer: *Provided,* That if any such company shall fail or refuse to make such report, or to pay such tax, at the time hereinbefore specified, or shall make any false statement in such report, or shall fail or refuse by its officers to appear before the Auditor General upon notice, as aforesaid, or shall fail or refuse to produce its books for examination when required to do so by the Auditor General, he shall, after having ascertained the actual value of each share of the capital stock of such company from the

best information he can obtain, add thereto fifty per centum as a penalty, assess the tax as aforesaid, and proceed according to law to collect the same from such company: *Provided further,* That if the president, cashier, or treasurer of any such company shall neglect or refuse to post a copy of the settlement, in a conspicuous place in such company's place of business, immediately upon the receipt of the same, so as to give notice to the shareholders, such president, cashier, or treasurer shall be adjudged to be in default, and, as a penalty for such default, such company shall be responsible to the Commonwealth for the amount of the tax assessed against the shareholders of such company: *And provided further,* That in case any such company shall collect annually from the shareholders thereof, or from the general fund of said company, said tax of five mills on the dollar upon the value of all the shares of stock of said company, the value of each share of stock to be ascertained and fixed by adding together so much of the capital stock paid in, the surplus, and undivided profits as is not invested in shares of stock of corporations liable to pay to the Commonwealth a capital stock tax or tax on shares, and dividing this amount by the number of shares of such title insurance or trust company, and pay said tax into the State treasury, on or before the first day of March in each year, the shares, and so much of the capital stock, surplus, profits, and deposits of such company as shall not be invested in real estate, shall be exempt from all other taxation under the laws of this Commonwealth.*

All acts and parts of acts inconsistent herewith are hereby repealed.†

836. Tax on Gross Premiums of Domestic Insurance Companies.

Hereafter it shall be the duty of the president, secretary, or other proper officer of each and every insurance company or association incorporated by or under any law of this Commonwealth, except companies doing business upon the purely mutual plan without any capital stock or accumulated reserve, and purely mutual beneficial associations whose funds for the benefit of members, their families or heirs are made up entirely of the weekly or monthly contributions of their members and the accumulated interest thereon, to make report in writing to the Auditor General

*Sec. 1, Act June 13, 1907, P. L., 640.
†Sec. 2, Act June 13, 1907, P. L., 640.

semi-annually upon the first days of July and January in each year, setting forth the entire amount of premiums and assessments received by such company or association during the preceding six months, whether the said premiums and assessments were received in money or in the form of notes, credits, or any other substitutes for money; and every such company or association shall pay into the State treasury semi-annually on the last days of January and July, in addition to any other taxes to which it may be liable under the first and under the twenty-first sections of this act, a tax of eight mills upon the dollar upon the gross amount of said premiums and assessments received from business transacted within this Commonwealth: *Provided,* That said report shall be made under oath or affirmation, and that it shall be the duty of the accounting officers of the Commonwealth to add ten per centum to the account of any company or association whose officers shall neglect or refuse for a period of thirty days to make the said report or to pay into the State treasury the tax imposed by this section.[3]

837. Decisions.

When a mutual insurance company is authorized by a supplement to its charter to make insurance for cash premiums to non-members, it ceases to be "purely mutual," and becomes subject to the tax on gross premiums. Lycoming Fire Ins. Co. *v.* Com., 10 W. N. C., 228; 14 L. Bar., 9.

When a corporation at the time of its dissolution by decree of the court is a debtor to the State for tax on gross premiums, the debt continues to exist, and is a charge on the assets which passed into the hands of the receiver under the Act of 1876. Com. *v.* Amer. Life Ins. Co., 14 Pa. C. C., 216.

Such corporation is liable on the principle of apportionment only for the tax on the gross premiums received up to the time it is dissolved, and not for the full six months. *Id.*

Of course the payment by a domestic insurance company of tax on its capital stock does not relieve it from payment of the tax on its gross premiums, nor does the payment of the tax on its gross premiums relieve it from taxation upon its capital stock. The tax on gross premiums is a franchise tax, the amount of which is measured by the amount of gross premiums earned by it within

(3) Sec. 24, Act June 1, 1889, P. L., 433; re-enacted by Sec. 1, Act of June 28, 1895, P. L., 408.

the State. It does not, therefore, conflict with any property tax. The same is true, in principle, as to the tax on gross receipts.

838. Reports.

Blanks upon which to make semi-annual reports for the periods ending June 30th and December 31st in each year, respectively, are sent by the Auditor General to the companies liable to the tax, about the dates named. The act requires that the tax shall be paid on the last days of July and January in each year. The provision as to the time within which reports for the above-named periods must be made is not definitely stated in the act, which provides that a penalty of ten per centum shall be added to the account of any company whose "officers shall neglect or refuse for a period of thirty days to make said report." Whether the said thirty days are to be reckoned from June 30th and December 31st, on which end, respectively, the periods for which the reports are to be made, or whether they are to be calculated from the last days of January and July, respectively, when the tax becomes due, is not clear. The practice is, however, to require the reports to be made on or before July 31st and January 31st, respectively, and not to require the payment of the tax until settlements have been made therefor, and copies have been served upon the companies against which the settlements are made, and the usual time for taking appeals has expired.

TAX ON PREMIUMS OF FOREIGN INSURANCE COMPANIES.

839. Act Imposing the Tax.

The premiums of foreign insurance companies are now taxed under the tenth section of the Act of April 4, 1873, P. L., 26, which is as follows:

No person shall act as agent or solicitor in this State of any insurance company of another State, or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association and there has been granted to said company or association, by the Commissioner [of Insurance], a certificate of authority showing that the company or association is authorized to transact business in the State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the Commissioner in the month of

January in each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the thirty-first day of December preceding, whether said premiums were received in money, or in the form of notes, credits, or any other substitute for money, and to pay into the State treasury a tax of three per centum upon said premiums; and the Commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury.

The proviso to Sec. 24, Act of June 1, 1889, P. L., 420, provides:

Hereafter the annual tax upon the premiums of insurance companies of other States or foreign governments shall be at the rate of two per centum upon the gross premiums of every character and description received from business done within this Commonwealth within the entire calendar year preceding.

Foreign *corporations,* duly licensed, may do a fire insurance business in Pennsylvania, but foreign persons, partnerships or unincorporated associations are expressly prohibited from doing such business by the Act of February 4, 1870, P. L., 14. This act is constitutional. Com. *v.* Vrooman, 164 Pa., 306; Op. Atty. Gen., Dec. 10, 1894. Rep. Atty. Gen., 1895-6, p. 532.

840. How the Tax Is Paid.

The tax on the premiums of foreign insurance companies is paid directly to the Commissioner of Insurance. No settlement therefor is made by the accounting officers. The Insurance Commissioner ascertains whether the amount paid corresponds with the premiums reported, and, if so, pays the money into the State treasury. There is no other manner of settling or adjusting the tax.

In collecting the tax on the premiums of foreign insurance companies, an allowance should be made for return premiums, but no deductions for the cost of reinsurance. Op. Atty. Gen., March 13, 1894. Atty. Gen.'s Rep., 1895-6, p. 529.

841. Constitutionality of the Tax.

The tax on the premiums of foreign insurance companies is

constitutional. Germania Life Ins. Co. *v.* Com., 85 Pa., 513; Ins. Co. of N. A. *v.* Com., 87 Pa., 173.

842. Payment to Cities and Boroughs of Part of Tax.

Sec. 2 of the Act of June 28, 1895, P. L., 410, provides:

On and after the first day of January, one thousand eight hundred and ninety-six and annually thereafter there shall be paid by the State Treasurer to the treasurers of the several cities and boroughs of the Commonwealth one-half of the net amount received from the two per centum tax paid upon premiums by foreign *fire* insurance companies. The amount to be paid to each of the treasurers of the several cities and boroughs shall be based upon the return of the said two per centum tax upon premiums received from foreign fire insurance companies doing business within the said cities and boroughs, as shown by the Insurance Commissioner's report. Warrants for the above purposes shall be drawn by the Auditor General, payable to the treasurers of the several cities and boroughs, in accordance with this act, whenever there are sufficient funds in the State treasury to pay the same.

This act does not state for what purpose the moneys so paid shall be used by the cities and boroughs receiving them. This omission is said to have resulted from the failure of certain proposed legislation connected with this subject, which would have made the purpose clear. There is no doubt, however, that it was the intention of the Legislature that the money should be used for the relief of disabled firemen, and most cities have recognized this intent by the disposition they have made of the shares received by them.

The Commissioner of Insurance makes a report to the Auditor General of the amount received in premiums by each foreign fire insurance company doing business within the State, from insurance effected in each city and borough respectively. From these reports the Auditor General opens accounts with the boroughs and cities, crediting them with the premiums reported as paid by the inhabitants thereof, by each foreign fire insurance company doing business in the State. The tax is then computed and warrants for one-half the amount thereof are mailed to the treasurers of the respective cities and boroughs.

843. Tax on Net Earnings or Income.

From and after the passage of this act every incorporated

company or limited partnership whatever, whether the same be incorporated, formed or organized under the laws of this or any other State or Territory, and doing business within this Commonwealth, and liable to taxation therein, which is not subject to the taxes imposed by the twenty-first or twenty-fourth sections of this act, except incorporated banks and savings institutions having capital stock, and foreign insurance companies, shall annually, upon the first Monday of November of each year, make report to the Auditor General under oath of some officer of such company, association, or limited partnership, setting forth the entire amount of net earnings or income received by said company or limited partnership from all sources during the preceding year; and upon such net earnings or income, the said company, association, or limited partnership, as the case may be, shall pay into the State treasury for the use of the Commonwealth, within sixty days thereafter, three per centum upon such annual net earnings or income, in addition to any taxes on personal property to which it may be subject under the first section of this act; and in case any company or limited partnership, as aforesaid, shall neglect or refuse to make the report required by this section to the Auditor General, on or before the thirty-first day of December following, such company, association, or limited partnership shall be liable to a penalty of ten per centum for such neglect, which shall be added to the amount of tax found due on the settlement of their account: *Provided,* That this section shall not apply to corporations and limited partnerships chartered or organized for manufacturing purposes.[4]

844. Decisions.

The net income of a corporation is liable to taxation, whether declared in dividends or not. Com. *v.* Ocean Oil Co., 59 Pa., 61.

A company claimed that it could have no net income until the capital stock invested in its business had been repaid. Held, that the income of the works, after deducting the expenses, was the net income to be taxed. *Id.*

A tax upon net earnings or income of trust companies which have no capital stock, holding bonds subject to the State tax on corporate loans, under Sec. 27 of the Act of June 1, 1889, is a tax on the franchises, and, therefore, not double taxation, al-

(4) Sec. 27, Act June 1, 1889, P. L., 435.

though the net earnings or income were derived from the interest on bonds taxable under the Act of 1885. Com. *v.* N. Y., L. E. & W. R. R. Co., 150 Pa., 234.

"The annual tax imposed by Sec. 10 of the Act of June 7, 1879, upon certain classes of corporations therein named is not laid upon the money and receipts of such corporations, but upon their franchises, the amount of the net earnings or income being resorted to simply as a just measure of the tax that should be paid for the enjoyment of the franchise.

"All corporations coming within the provisions of the above act are thereby bound to pay annually to the Commonwealth a fixed per centum rate upon all their income, even though a part thereof may be derived from loans of the United States and from loans of the Commonwealth, which, by the acts authorizing the issue, are expressly made free from all State taxes.

"Such corporations are not entitled to deduct from the amount of income upon which tax is payable by them the difference between the amount expended several years before in the purchase of a security, and the par value at which the security has been redeemed within the current year. This cannot be properly regarded as a loss; even if it should be so, the capital is only decreased thereby, and this does not necessarily diminish the annual net earnings, which have alone been adopted as the measure of the tax imposed." Phila. Contributionship for Ins., etc. *v.* Commonwealth, 98 Pa., 48.

845. Tax on Matured Stock of Building and Loan Associations.

The Act of June 22, 1897, P. L., 178, provides as follows:

Upon all full-paid, prepaid and fully matured or partly matured stock in any building and loan association incorporated under the laws of this State, or incorporated under the laws of any other State and doing business within this State, and upon which annual, semi-annual, quarterly, or monthly cash dividends or interest shall be paid, there shall be paid a State tax equal to that required to be paid upon money at interest by the general tax laws of this State; and such tax shall be deducted from the cash dividend or interest so provided for by the secretary or treasurer of such corporation, and be paid to the State Treasurer. And every such domestic corporation shall annually make return to the Auditor General, at the time other returns for taxation are required to be made, of the amount of its

stock outstanding entitled to receive cash dividends or interest and every such foreign corporation shall, in the reports required to be made by them to the banking department, make report of the amount of its stock, held by residents of this State, entitled to receive cash dividends or interest; and said banking department shall, at the time other returns for taxation are required to be made, certify to the Auditor General the amount of such stock each of said foreign corporations had outstanding at the time of its last report to said banking department, and upon said sum such foreign corporations shall pay the tax above required to be paid to the State Treasurer, upon demand, and failure to make such payment within thirty days after such demand shall have been made shall subject such corporation to the forfeiture of its right to transact business in this State: *Provided, however,* That nothing in this act shall be taken to require the payment of any tax upon any unmatured stock of building and loan associations upon which periodical payments are required to be made, or upon any such stock after it has matured and is in process of payment.

Prior to the passage of the foregoing act, building and loan associations were exempt from all State taxation. See Sec. 804.

It will be observed that the Act of 1897 mentions not only "full-paid, prepaid, and fully matured" stock, but also, "partly matured" stock; but this provision relative to partly matured stock seems to have been negatived by the last sentence of section one (which sentence was an amendment to the original bill), which provides that "Nothing in this act shall be taken to require the payment of any tax upon any unmatured stock of building and loan associations upon which periodical payments are required to be made, or upon any such stock after it has matured and is in process of payment."

The time when domestic associations shall make their reports to the Auditor General is fixed "at the time other returns for taxation are required to be made." Inasmuch as there are different periods for making reports for different kinds of taxes, this time is uncertain, but the Auditor General's Department holds that, as the tax imposed is a tax "equal to that required to be paid upon money at interest"—*i. e.*, the tax on personal property, the tax-year for which is the calendar year, the reports of building and loan associations shall also be made for the calendar year, and be made as soon after the thirty-first day of December in each year as circumstances will permit.

Building and loan associations are now required to register in the Auditor General's Department, like other corporations, under the provisions of the nineteenth section of the Act of June 1, 1889.

846. Tax on Store Orders, etc., Not Payable in Cash.

Every person, firm, partnership, corporation, or association shall, upon the first day of November of each and every year make a report, under oath or affirmation, to the Auditor General, of the number and amount of all orders, checks, dividers, coupons, pass-books, and all other books and papers, representing the amount, in part or whole, of the wages or earnings of an employe, that was given, made or issued by him, them or it for payment of labor, and not redeemed by the said person, firm, partnership, corporation, or association, giving, making or issuing the same, by paying to the employe or a member of his family the full face value of said order, check, divider, coupon, pass-book, or other paper, representing an amount due for wages or earnings, in lawful money of the United States, within thirty (30) days from the giving, making or issuing thereof; the honoring, though, of said order, check, divider, coupon, pass-book, or other paper, representing an amount due for wages or earnings, by a duly chartered bank, by the payment in lawful money of the United States, to the amount of said paper, representing an amount due for wages or earnings, is a payment, and he, they or it shall, besides other requirements of law, pay into the treasury of the Commonwealth (25) per centum on the face value of such orders, checks, dividers, coupons, pass books or other paper, representing an amount due for wages or earnings, not redeemed as aforesaid; and in case any person, firm, partnership, corporation, or association shall neglect or refuse to make report, required by this section, to the Auditor General, on or before the first day of December of each and every year, such person, firm, partnership, corporation, or association, so neglecting or refusing, shall, besides other requirements of law, pay as a penalty into the State treasury twenty-five (25) per centum, in addition to the twenty-five (25) per centum tax imposed as aforesaid in this section, on the face value of all such orders, checks, dividers, coupons, pass-books, or other paper, representing an amount due for wages or earnings, not redeemed by paying the employe or member of his family in lawful money of the United States, within said thirty (30) days, by the person, firm, partnership, corporation, or association mak-

ing, giving or issuing the same; the honoring of paper, representing wages or earnings, by a bank is a sufficient payment: *Provided,* This act shall not apply to tools and blasting material, and other mine supplies, furnished by the employer to the employe, used by the employe at or about the employe's vocation; "nor to coal sold by the employer to the employe, nor to rent for houses leased from the employer and occupied by the employe:" *And provided further,* That this act shall not apply to moneys paid to the treasurers of the employes about coal mines, who have agreed to have a pro rata part of their earnings paid by the operator to such treasurers, who are to pay check-weighman or check-measurers.[5]

847. Decisions.

The manifest intent of the Act of June 26, 1901, was to compel the payment of wages earned by employes in cash, by imposing a prohibitory tax upon orders, etc., given by the employer for labor, and not paid or redeemed at their face value within thirty days from the date of issue, in lawful money.[6]

The act visits its displeasure upon the non-redemption of orders, checks, etc., issued by the employer, and representing wages or earnings, in lawful money within thirty days from the issuing of the same.[7]

Nothing is required to be reported and consequently nothing can be taxed or penalized but orders, checks and papers issued, representing amounts due for wages or earnings, and not redeemed in the manner specified in the act within thirty days. If no orders, checks or papers are issued by the employer for labor or earnings, no report is required, and no tax is payable, albeit deductions may have been made from the gross earnings.[8]

An employer is not taxable on amounts deducted from wages of employes on account of orders drawn on the employer in favor of third persons and paid prior to the regular pay day.[9] Nor are subscriptions paid to religious or charitable institutions by an employer out of the wages of his employes, at their request, tax-

(5) Act June 24, 1901, P. L., 596.
(6) Com. *v.* Bethlehem Steel Co., 5 Dau. Co. Rep., 1 (1902).
(7) Com. *v.* Buffalo & Susquehanna R. Co., 5 Dau. Co. Rep., 10 (1902).
(8) Com. *v.* Buffalo & Susquehanna R. Co., 5 Dau. Co. Rep., 10 (1902).
(9) Com. *v.* Hyatt School Slate Co., 5 Dau. Co. Rep., 16 (1902); Com. *v.* Bethlehem Steel Co., 5 Dau. Co. Rep., 1 (1902).

able,[10] nor subscriptions to a relief fund, similarly retained by the employer.[11]

An employer is not subject to tax on deductions from wages of employes for amounts paid as premiums on policies of insurance issued at the request of the employes, and upon their authority, nor for amounts deducted on accounts of orders drawn upon the employers in favor of third parties for goods, store bills, and boarding.[12] Nor on amounts deducted from wages due employes on account of the payment of water rents on houses owned by the employer, and occupied by the employes, the employer having no interest in the water company; nor for amounts deducted on account of lumber furnished the employes, interest on lots sold and incidentals, or taxes paid for employes.[13]

Defendant rendered a statement to its employes before payday wherein it credited them with the total earnings and charged them with certain disbursements made by it on their account. There was attached to this exhibit, separated therefrom by a perforated line, a receipt, which when signed by the employe, detached and presented, was paid by the company in cash and represented the difference between the credits and charges. The defendant had no ownership or interest in any store or store business. The items charged were for orders drawn by the employes in favor of the Upper Lehigh Supply Company, upon the defendant, for merchandise and goods furnished out of the store, and paid to the Supply Company by the defendant for "Board, Doctor, Presbyterian Church, Priest, Fourth of July Celebration," and for "Balance," by which is meant an amount brought forward from month to month for rent due; all representing sums paid at the request of the employes. Held, that the defendant was not taxable, the statements referred to not being within the meaning of the act.[14]

A paper given by a coal company to an employe, in which the latter is credited with all wages earned, debited with the amount paid to him upon his orders, and showing the balance due him,

(10) Com. *v.* Bethlehem Steel Co., 5 Dau. Co. Rep., 1 (1902).

(11) Com. *v.* Bethlehem Steel Co., 5 Dau. Co. Rep., 1 (1902).

(12) Com. *v.* Harvey & Sullivan, 5 Dau. Co. Rep., 20 (1902); Com. *v.* Empire Coal Mining Co., Id., 31 (1902).

(13) Com. *v.* Susquehanna Coal Co., 5 Dau. Co. Rep., 27 (1902).

(14) Com. *v.* Upper Lehigh Coal Co., 5 Dau. Co. Rep., 33 (1902); Com. *v.* Rochester and Pittsburg Coal & Iron Co., Id., 37 (1902); Com. *v.* Susquehanna Coal Co., Id., 27 (1902).

which is payable in cash, is not taxable under the provisions of the Act of June 24, 1901, P. L., 596.[15]

848. Resume of the Manner in Which Corporate Property Is Taxed in Pennsylvania.

Kind of Property.	*Local Taxation**	*State Taxation.*
Bonds, mortgages, etc., owned by corporations paying a tax on capital stock, in their own right.	Not taxable.	Not taxable directly but the capital stock invested therein is taxed at the rate of 5 mills on the dollar of its actual value.
——— held by corporations in trust, or in any fiduciary capacity.	Not taxable	Taxable through the local assessors and county commissioners at the rate of 4 mills on each dollar of the nominal value thereof; or, if the obligations so held are those issued by domestic corporations, the tax thereon is deducted from the interest.
Gross premiums of domestic insurance companies with capital stock.	Not taxable.	Taxable at the rate of 8 mills on the dollar of such premiums received from business done in Pennsylvania.
Gross receipts of transportation, transmission, and electric light companies.	Not taxable.	Taxable at the rate of 8 mills on the dollar of receipts of transportation and transmission companies derived from traffic wholly within the State, and of receipts from the business of electric light companies.
Real estate	Taxable the same as that of individuals except in the case of *public corporations* like railroad companies, the property of which, essential to the exercise of their franchises, is not taxable locally, except in Philadelphia and Pittsburg.	Not taxable directly, but the capital stock which is invested therein is taxable at the rate of 5 mills on the dollar of the actual value thereof.
Shares of stock of other corporations paying a tax on their capital stock.	Not taxable.	Not taxable, because the companies issuing such shares pay a tax on their capital stock, these shares only indicating what interest the company holding the shares has in that capital stock which has already paid tax.
Shares of stock of corporations *not* paying a capital stock tax.†	Not taxable.	Not taxable directly, but the capital stock invested in is taxed at the rate of 5 mills on the dollar of the actual value thereof.

(15) Com. *v.* Lehigh Coal & Nav. Co., 206 Pa., 641 (1903).

*It will be remembered that, as we have already seen, the State tax on personal property is not "local taxation."

†The company referred to here as not paying a capital stock tax is the company *issuing* the shares of stock, *not* the company *holding* and owning them. The latter company is supposed to pay such tax.

From the foregoing it is apparent that, in taxing the capital stock of a company which, in itself, is a "mere myth," as Justice Paxson, of the Supreme Court, has truly said, in Fox's Appeal, 112 Pa., 337, the Commonwealth taxes all the property of a company and its assets (as well as its franchise), leaving the real estate held by it, subject to local taxation, like that of an individual, except in the cases of public corporations, like railroads, canals, etc. Corporations are thus treated like individuals, whose moneys at interest, etc., which may be said to constitute *their* "capital stock," are taxed for State purposes, while their real estate is liable only to local taxation. Railroad and other public corporations, being exempt from taxation, locally, on their real estate, bear the additional burden of a State tax on their gross receipts.

The shares of stock of corporations paying a tax upon their capital stock are not taxed in the hands of the holders thereof, because such shares are not, in themselves, property. They only indicate what interest each holder thereof has in the property of the company issuing them, and that property, as a whole, is taxed through the capital stock, which represents it.

The property of corporations *not paying a capital stock tax* (except in the case of incorporated banks, and savings institutions with capital stock), is taxable precisely like that of an individual, and such companies pay, further, a State tax of three per cent. on their net earnings.

849. Compromising of Taxes Due by Insolvent Corporations.

It shall be lawful for the State Treasurer and Auditor General to settle and adjust with any corporation, whether domestic or foreign, that has heretofore carried on business in this State and which is now indebted to the Commonwealth, but has gone into liquidation, become insolvent or ceased to carry on business, and which has no known or available property in this or any other State that may be seized in the execution by process thereof issued out of any of the courts of this or any other State, may compound or settle any taxes due by the same to this Commonwealth on such terms as may be adjudged by said officers to be for the best interests of the Commonwealth: *Provided*, That such extension, composition or settlement shall be approved by the Attorney General. Act of June 10, 1881, P. L., 114.

850. Sheriffs to Notify Auditor General of Prospective Judicial Sales of Property of Corporations.

Hereafter when any writ of execution is placed in the hands of any sheriff in this Commonwealth, for the purpose of selling the property or franchises of any corporation, limited partnership, or joint stock association, it shall be the duty of such sheriff forthwith to notify the Auditor General, furnishing him information as follows:

First. Name of the corporation, limited partnerships or joint-stock association, defendant.

Second. Name of the plaintiff in the writ of execution.

Third. Nature of property levied upon and to be sold, and location of the same.

Fourth. The time when the property or franchise will be sold, and the return day of the writ upon which sale will be made.

For the services herein directed to be performed, the sheriff is hereby authorized to tax, and collect as cost in the writ of execution against said corporation, limited partnership or joint-stock associations, the sum of two ($2.00) dollars: *Provided, however,* That when more than one writ is made returnable to any one return day, the costs hereinbefore allowed shall only be taxed upon one writ of execution.

Act of May 29, 1901, P. L., 344.

851. Trustees, Receivers, Etc., to Notify Auditor General of Prospective Sales of Property of Corporations.

Hereafter, for the purpose of aiding the Auditor General in the collection of taxes due the Commonwealth from corporations, limited partnerships, and joint-stock associations, it shall be the duty of any trustee, assignee, receiver, master, or other officer, however named or appointed, to notify the Auditor General when such officer is preparing to sell the property, real or personal, of any corporation, limited partnership, or joint-stock association; such notice to contain the following information:

First. Name of the corporation, limited partnership, or joint-stock association, party defendant.

Second. Name of the plaintiff, or party on whose account the sale is made.

Third. Nature of the property to be sold, and location of same.

Fourth. Time and place of sale.[16]

(16) Sec. 1, Act May 25, 1907, P. L., 250.

The information noted in section one of this act must be filed with the Auditor General at least ten days prior to advertising for sale the property of any corporation, limited partnership, or joint-stock association.[17]

852. No Distribution of Proceeds of a Sale to Be Approved Unless Such Notification Is Given.

No distribution of the proceeds arising from the sale of property of a corporation, limited partnership, or joint-stock association, by a trustee, assignee, receiver, master, or other official, shall be approved or authorized by the court having jurisdiction unless there be filed therein a certificate from the Auditor General, under his hand and seal of the department, showing that notice of such sale was filed with him in accordance with the provisions of this act.[18]

(17) Sec. 2, Act May 25, 1907, P. L., 250.
(18) Sec. 3, Act May 25, 1907, P. L., 250.

CHAPTER XXXIII.

ACADEMIES, COLLEGES, UNIVERSITIES AND INSTITUTIONS OF LEARNING.

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868. Such Boards to Thereafter Elect Trustees—Number of Trustees and Term.
869. Quorum of Corporators and Trustees.
870. Officers of the Board of Trustees.

853. Incorporation Authorized.

Corporations may be formed under the provisions of this act . . . . for . . . . II. The support of any . . . . educational . . . . undertaking.[1]

854. Incorporation of Institutions of Learning with Authority to Confer Degrees—Powers.

All institutions of learning hereafter to be incorporated as

(1) Secs. 1 and 2, Act April 29, 1874, P. L., 73.

colleges, universities or theological seminaries with power to confer degrees in art, pure and applied science, philosophy, literature, law, medicine and theology, or any of them, shall be incorporated in a manner hereinafter set forth, with general power as follows:

First. To have succession by their corporate names for the period limited by their charters, and when no period is limited thereby, or by this act, perpetually, subject to the power of the General Assembly, under the Constitution of this Commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter or by law.

Fifth. To appoint and remove such subordinate officers and agents as the business of the corporation requires, and to allow them suitable compensation.

Sixth. To make by-laws, not inconsistent with law, for the management of their property and the regulation of its affairs.

Seventh. To enter into any obligation necessary to the transaction of their ordinary affairs.[2]

855. Certificate of Incorporation.

Whenever five or more persons, three of whom at least are citizens of this Commonwealth, shall voluntarily associate themselves together for the purpose of obtaining a charter of incorporation as a college, university or theological seminary with power to confer degrees as aforesaid, they shall prepare a certificate of such intended incorporation which shall set forth:

I. The name of the corporation.

II. The purpose for which it is formed.

III. The place or places where its business is to be transacted.

IV. The term for which it is to exist.

V. The names and residences of the subscribers.

VI. The number of its directors, trustees or managers, and the places of residence of those who are chosen as such for the first year.

VII. The amount of assets in the possession of said subscrib-

(2) Sec. 1, Act June 26, 1895, P. L., 327.

ers which are to be devoted to the purpose of establishing and conducting said college or university.

VIII. The minimum number of persons whom it is intended to regularly employ as members of the faculty of said corporation.

IX. A brief statement of the requirements for admission and of the course of study to be pursued in said institution.[3]

856. Notice of Intention to Apply for Charter.

Notice of the intention to apply for any such charter shall be inserted in two newspapers of general circulation, printed in the proper county, for three weeks, setting forth briefly the character and object of the corporation to be formed and the intention to make application therefor.

857. Duty of the Court on Submission of Applications for Charter.

Said certificate of incorporation shall be acknowledged by at least three of said subscribers, and before the recorder of deeds, et cetera, of the county in which the business of the corporation is to be transacted, to be their act and deed and for the purposes therein contained, and the same having been duly certified under the hand and official seal of said recorder of deeds, et cetera, shall be presented to any law judge of a Court of Common Pleas of said county, accompanied by the proof of publication of the notice of such application, who is hereby required to peruse and examine said instruments, and, if the same be found to be in proper form and within the purposes of this act and shall appear lawful and not injurious to the community, he shall endorse thereon these facts and shall thereupon direct the prothonotary or clerk of said court to transmit to the Superintendent of Public Instruction of the Commonwealth a certified copy of said certificate of incorporation, together with the said endorsements thereon.[5]

858. The "College and University Council" Constituted to Pass Upon Applications for Charter.

No charter for such incorporation, with power to confer degrees as aforesaid, shall be granted until the merits of the application, from an educational standpoint, shall be passed upon by

(3) Sec. 2, Act June 26, 1895, P. L., 327.
(4) Sec. 3, Act June 26, 1895, P. L., 327.
(5) Sec. 4, Act June 26, 1895, P. L., 327.

a board to be styled the "College and University Council," which shall consist of twelve members, namely, the Governor, the Attorney General and the Superintendent of Public Instruction, who shall be members ex-officio, three persons selected from the presiding officers of undenominational colleges or universities of this Commonwealth, three persons selected from the presiding officers of denominational colleges or universities of this Commonwealth, and three persons holding official relationship to common schools of the State. Those who are not ex-officio members shall be appointed by the Governor, with the advice and consent of the Senate, for a term of four years.[6]

859. Requirements as to Investments and Faculty of Institutions Applying for Charter.

No institution shall be chartered with the power to confer degrees, unless it has assets amounting to five hundred thousand dollars invested in buildings, apparatus and endowments for the exclusive purpose of promoting instruction, and unless the faculty consists of at least six regular professors who devote all their time to the instruction of its college or university classes, nor shall any baccalaureate degree in art, science, philosophy or literature be conferred upon any student who has not completed a college or university course covering four years. The standard of admission to these four year courses or to advanced classes in these courses shall be subject to the approval of said council.[7]

860. "College and University Council" to Pass Upon Applications for Charter and Return to Court with Its Recommendations.

Upon the receipt of said certified copy or certificate of incorporation as directed in section four of this act, the said Superintendent of Public Instruction shall, within sixty days thereafter, cause said "College and University Council" to be convened at such time and place as he may designate, and said council shall thereupon hear and consider said application, and if the course of instruction and standard of admission to said institution and the composition of the faculty shall appear to said council to be

(6) Sec. 5, Act June 26, 1895, P. L., 327.
(7) Sec. 6, Act June 26, 1895, P. L., 327.

sufficient, and the educational needs of the particular locality in which the proposed institution is to be situated and of the Commonwealth at large are likely to be met by the granting of said application, the said council shall thereupon cause to be endorsed on said application or certificate its findings and its approval of the same, together with a recommendation to the law judge or court before whom the same was originally presented that the same be granted. If, in the judgment of the council, the said application should not be granted, it shall endorse thereon its findings and its disapproval of the same with a recommendation that said application be refused. The said certified copy of said certificate shall, with the endorsements thereon, thereupon be returned to the said law judge or court, who, in finally passing upon the application, shall be guided in his decree by the finding of the College and University Council. In case the law judge, after giving his consideration to the findings of said council, shall be satisfied with the propriety of the application in view of all the facts, he shall approve the same and order and decree that, upon the recording of said certificate with the recommendation of said council and a copy of said order of court in the recorder's office aforesaid, the subscribers thereto and their associates and successors shall be a corporation for the purpose and upon the terms therein stated, and thenceforth the persons named therein and subscribing the same, and their associates and successors shall be a corporation by the name therein given. In case of the disapproval of said application by the council aforesaid the proposed charter shall not be granted.[8]

861. A Majority of Members of the Council Must Concur in Its Recommendations.

In the transaction of business of said "College and University Council" the concurrence of a majority of the members thereof shall be required.[9]

862. Institutions Chartered to Be Subject to Visitation of the Council.

All institutions chartered under this act shall be subject to visitation and inspection by representatives of the council, and if

(8) Sec. 7, Act June 26, 1895, P. L., 327.
(9) Sec. 8, Act June 26, 1895, P. L., 327.

any one of them shall fail to keep up the required standard the court shall, upon the recommendation of the council, revoke the power to confer degrees.[10]

863. Meetings of Council—Biennial Report.

The council shall meet regularly on the first Tuesday of October preceding the biennial session of the Legislature, and shall submit to that body a biennial report upon higher education in Pennsylvania; said report to be printed in connection with the report of the Superintendent of Public Instruction.[11]

864. Amendment of Charters of Institutions Already Incorporated.

Any college, university or theological seminary, heretofore incorporated under the laws of this Commonwealth, may apply to any law judge of any Court of Common Pleas of the county in which the business of such corporation is transacted for amendments to its charter, enabling it to confer degrees in like manner as institutions originally incorporated under this act, and in the application therefor it shall follow the requirements of this act in respect of applications for original charters or incorporation and the method of procedure prescribed therefor. Such applications for amendments shall be acted upon by the same authorities and in the same manner as provided in this act for the original incorporation of colleges, universities and theological seminaries. No such amendment shall be granted, however, unless the institution applying therefor shall bring itself within the provisions of this act as fully as is required in the granting of original charters under this act.[12]

865. Institutions Heretofore Incorporated by Special Acts and Having One Hundred Thousand Dollars Invested May Obtain Power to Confer Degrees.

When a college or theological seminary has heretofore been incorporated by special act of Assembly, it may obtain the power to confer degrees from the court as above set forth, provided it has invested funds amounting to one hundred thousand dollars at the time of the passage of this act. This act furthermore shall

(10) Sec. 9, Act June 26, 1895, P. L., 327.
(11) Sec. 3, Act May 16, 1895, P. L., 83.
(12) Sec. 11, Act June 26, 1895, P. L., 327.

not impair the authority of colleges heretofore incorporated by such Courts of Common Pleas with power to confer degrees in cases where such institutions have property or capital, at the time of the passage of this amendment, of at least one hundred thousand dollars, and which shall, within three months after the passage of this amendment, file with the Superintendent of Public Instruction of this Commonwealth a sworn statement that the assets held by them individually for the purpose of promoting education in the higher branches of human learning amount to the sum of one hundred thousand dollars, nor shall this act impair the authority of universities similarly incorporated by the courts with power to confer degrees in cases where such institutions possess property at the time of the passage of this act amounting to the sum of five hundred thousand dollars, and which shall, within three months from the passage of this act, file with the Superintendent of Public Instruction of this Commonwealth, a sworn statement that the assets held by them individually for the purpose of promoting instruction in the higher branches of human learning amount to the sum of five hundred thousand dollars; none of the provisions of this act, however, shall be construed as applying to institutions possessing capital stock and established for purposes of private profit or gain.[13]

866. Power to Confer Degrees of Corporations Formed Prior to the Passage of the Act of June 26, 1895, P. L. 327.

Institutions of learning incorporated under the provisions of the Act of April 29, 1874, might, prior to the passage of the Act of June 26, 1895, P. L., 327, be lawfully invested by the courts incorporating the same with the right to confer degrees, and such institutions, so empowered, having property or capital at the time of the passage of said Act of 1905, of at least $100,000, and complying with the provisions of the twelfth section thereof, still have said right.[14]

867. The Trustees of Academies Chartered by Special Acts Providing for the Election of Trustees by Voters, May Appoint Boards of Incorporators Thereof.

The board of trustees of any academy chartered by an act of

(13) Act of May 7, 1901, P. L., 18, amending Sec. 12, Act June 26, 1895, P. L., 327.

(14) Literary Degrees. Op. Atty. Gen., 17 Pa. C. C. Rep., 578 (1896).

Assembly of this Commonwealth, whose trustees are now chosen by the votes of the qualified electors of a county or part of a county in which such academy is located, be and they are hereby authorized to select and appoint thirty qualified voters of said county as corporators of such academy, who shall, within twenty days after their appointment, meet and organize as a board of corporators of such academy by the election of a president and secretary, who shall hold their respective offices until the next annual meeting of said board, which shall be on the second Monday of January next after the passage of this act, and on the second Monday of January in each year thereafter; and any vacancy that may happen in such board shall be filled at the next annual meeting of said board or at a meeting called for that purpose.[15]

868. Such Boards to Thereafter Elect Trustees—Number of Trustees and Term.

The board of corporators, when thus organized, shall elect from the members of the board, nine trustees of such academy, who shall serve until the second Monday of January next after the passage of this act, and on said second Monday of January they shall elect three trustees to serve for one year, three to serve two years and three to serve for three years, and annually thereafter they shall elect three trustees to serve for three years; and any vacancy that may happen in said board of trustees by death, removal from the county or otherwise, shall be filled from the members of said board of corporators at the next regular meeting, or at a meeting called for that purpose, to serve until the next regular meeting.[16]

869. Quorum of Corporators and Trustees.

A majority of the board of corporators and of the board of trustees shall constitute a quorum of each board.[17]

870. Officers of the Board of Trustees.

The officers of said board of trustees shall be a president, a secretary and a treasurer, each to serve for one year, but the same person may be both secretary and treasurer; and the manage-

(15) Sec. 1, Act May 16, 1895, P. L., 83.
(16) Sec. 2, Act May 16, 1895, P. L., 83.
(17) Sec. 3, Act May 16, 1895, P. L., 83.

ment and control of the property and funds of such academy, and the duties and responsibilities of said trustees, shall be the same as is provided in the charter of such academy.[18]

(18) Sec. 4, Act May 16, 1895, P. L., 83.

CHAPTER XXXIV.

AGRICULTURAL AND HORTICULTURAL SOCIETIES.

871. Incorporation Authorized.
872. May Appoint Policemen.
873. Penalty for Injuring Property of Exhibitors.

871. Incorporation Authorized.

Corporations may be formed under the provisions of this act . . . . for . . . . IV. The encouragement of agriculture and horticulture.[1]

872. May Appoint Policemen.

The board of managers or executive committee, of any agricultural or horticultural society of this State, is hereby authorized to appoint as many citizens of this State, policemen, as shall be necessary for their exhibitions, whose duty it shall be to preserve order within and around the grounds of said society; protect their property within said grounds; to eject all persons who shall be improperly within the grounds of said society, or who shall be guilty of disorderly conduct, or who shall neglect or refuse to pay the fee or observe the rules prescribed by said society; said policemen shall have the same power the time said exhibition shall continue, that a constable may have by law, in serving criminal process and making arrests, and in addition, may arrest any person for the commission of any offense, mentioned in section two.[2]

873. Penalty for Injuring Property of Exhibitors.

Any person, who shall willfully injure or destroy the property of exhibitors, visitors or lessees, on the fair grounds, or shall hinder or obstruct the officers and police in their duties, shall be deemed guilty of a misdemeanor, and upon conviction shall be subject to a fine not less than one, or more than twenty-five dollars, or imprisonment not exceeding thirty days, at the discretion of the court before whom the offender may be tried.[3]

(1) Secs. 1 and 2, Act April 29, 1874, P. L., 73.
(2) Sec. 1, Act April 26, 1883, P. L., 14.
(3) Sec. 2, Act April 26, 1883, P. L., 14.

CHAPTER XXXV.

ARTIFICIAL GAS COMPANIES.

874. History.

ARTIFICIAL GAS COMPANIES SPECIALLY INCORPORATED SUBJECT TO THE PROVISIONS OF THE ACT OF MARCH 11, 1857, P. L., 77.

875. Commissioners to Receive Subscriptions.
876. Issue of Charter—Organization—Power of Corporation.
877. Stockholders to Cast One Vote for Each Share of Stock Held by Them.
878. Stockholders not Entitled to Vote Unless all Their Shares are Fully Paid.
879. Elections—Judges of Election.
880. Annual Meeting of Stockholders.
881. Vacancies in Offices or Board of Managers.
882. Stock Certificates—Transfer of Stock.
883. Penalty for Failure to Pay Call on Subscription.
884. Power to Supply Gas.
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887. Power to Borrow Money and Mortgage Property.
888. Power to Borrow Money and Mortgage Property Extended to Gas, Bridge and Water Companies Specially Incorporated Prior to 1857.
889. Stock Certificates to Issue to the Amount of the Cost of New Buildings and Material Improvements.
890. Dividends to be Declared Semi-annually.
891. Penalty for Tapping Mains or Pipes.
892. Penalty for Malicious Injury to Property of Corporation.
893. After Twenty Years Municipalities May Purchase Plant.
894. Charter Subject to Power of Legislature to Alter, etc.
895. Corporation to Elect a President and five Managers, who Shall Appoint Other Officers, Including a Treasurer.

ARTIFICIAL GAS COMPANIES INCORPORATED UNDER THE PROVISIONS OF THE ACT OF APRIL 27, 1874.

896. Incorporation Authorized.
897. Statement of Purpose in Charter.
898. Application for Charter Must Designate the Territory Within Which the Franchises of the Company are to be Exercised
899. Powers of Artificial Gas Companies.
900. Franchise for Manufacture of Gas for Light Only to be Exclusive.
901. Revocation of Exclusive Right Gained by Acceptance, by Gas Companies Formed Prior to the Date of its Passage of the Provisions of the Act of April 29, 1874, and its Supplements.
902. Prohibition and Punishment of Interference with Property of Gas Companies.
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chase Works—Courts of Common Pleas to Determine Reasonableness of Charges for Gas.
904. Purchase of Property and Franchises of Water, Gas and Electric Light Companies by Cities of the Third Class.
905. Exclusive Privileges of Gas Companies.
906. Where Previously Incorporated Companies Have Forfeited Franchises.
907. Municipal Consent.
908. Municipal Impositions and Regulations.
909. Liability for Consequential Damages.
910. Gas Companies May Reorganize Under the Act of May 25, 1878.
911. Gas Companies may Deal in Appliances for the Use of Gas.
912. Leasing of Municipal Gas Plants.

874. History.

Artificial gas companies, in common with corporations of all other classes, were originally incorporated in Pennsylvania under the provisions of special acts, some of which provided that the corporations formed under their provisions should have the exclusive right to furnish gas to the public within their charter limits, and some did not.

The Act of March 11, 1857, P. L., 77, entitled "An act to provide for the incorporation of gas and water companies," did not in fact provide for the incorporation of such companies, but merely for the regulation thereof when they had been formed under the authority of such acts. This act did not confer exclusive franchises upon the corporations governed by it, although the special acts of incorporation creating such companies usually did. This act, with the supplements thereto, is still in force and regulates gas and water companies formed under the provisions of special acts, so far as its provisions are not inconsistent with specific provisions contained in such special acts of incorporation respectively, which have not accepted the provisions of the Act of April 29, 1874. The said act with its supplements is given in this chapter.

It will be noted that legislation relative to gas companies in Pennsylvania is usually contained in acts applicable to both gas and water companies. For purposes of clearness, however, it has been sought in this chapter and in the chapter on water companies to separate the provisions relating to the two different classes of corporations. No attempt to do this, however, has been made in the case of the Act of 1857.

Under the provisions of Sec. 34, of the Act of April 29, 1874, all companies incorporated under the provisions of that act for

the manufacture and supply of gas acquired exclusive franchises, which continued to be exclusive until such companies realized and divided among their stockholders, during five years, dividends equal to eight per centum per annum upon their capital stock, and the Commonwealth was expressly prohibited from granting another charter for the same purpose within the same territory until the corporation had earned and declared dividends equal to eight per centum per annum upon its capital stock for five years.

This was the state of the law until the passage of the Act of June 2, 1887, P. L., 310,[1] which made the right to supply gas for light only an exclusive one, subject to the same limitation as to payment of dividends for five years, while that of supplying gas for heat and fuel is non-exclusive.

Under the Act of 1887, the question arises whether a corporation may be formed with the power to furnish gas for light, heat and fuel, its power to furnish gas only being an exclusive franchise, while its other powers are non-exclusive, or whether only a corporation formed solely for the purpose of furnishing gas for light only can acquire an exclusive franchise.

The Secretary of the Commonwealth originally held that two classes of corporations were formed by the Act of 1887, one for the supply of gas for light only, which had an exclusive franchise, and one for the manufacture and supply of gas for heat and fuel, which does not have an exclusive franchise, and that charters would not be granted to corporations to furnish gas for light, heat and fuel.[2] It is understood, however, that the present ruling of the Secretary of the Commonwealth is that a company may be incorporated for the manufacture and supply of gas for light, heat and fuel, acquiring thereby an exclusive right to furnish gas for light only, and a non-exclusive right to manufacture and furnish gas for other purposes.[3]

ARTIFICIAL GAS COMPANIES SPECIALLY INCORPORATED SUBJECT TO THE PROVISIONS OF THE ACT OF MARCH 11, 1857, P. L., 77.

875. Commissioners to Receive Subscriptions.

Whenever a special act of the General Assembly shall be passed

(1) See Sec. 900.

(2) City Gas Light Co. of Phila. Op. Sec. Com., 18 Pa. C. C., 136 (1896).

(3) See Whitworth's Creation of Corporations for Profit, p. 82.

authorizing the incorporation of a gas or water company within this Commonwealth, the commissioners named in such act, or any five of them, shall have power to open books for receiving subscriptions to the capital stock of said company, at such time or times and such place or places as they may deem expedient, after having given at least ten days' previous notice in one or more newspapers published, or having circulation within the county where said company shall be located; at which time and place two or more of the said commissioners shall attend, and permit all persons of lawful age who shall offer to subscribe in such books in their own names, or in the name of any other person who shall duly authorize the same, for any number of shares of stock; and the said books shall be kept open respectively for the purpose aforesaid at least three hours in every judicial day, for the space of five days, or until the said books shall have therein subscribed the whole number of shares authorized by such special act, and if at the expiration of the said five days the books aforesaid shall not have the said number of shares authorized as aforesaid therein subscribed, the attending commissioners may adjourn from time to time and transfer the books from place to place until the whole number of shares shall be subscribed, or such number of shares as shall be required before the issue of letters patent as hereinafter provided, of which adjournment and transfer the commissioners aforesaid shall give such public notice as the occasion may require; and when the whole number of shares subscribed shall amount to the number authorized or required as aforesaid, the same shall be closed: *Provided, always,* That every person offering to subscribe in such books, in his or her own or any other name, shall at the time of subscribing pay to the attending commissioners any sum not less than one nor more than five dollars (as shall be fixed and determined by said commissioners previously to the opening of the books) for every share so subscribed, out of which shall be defrayed such incidental charges and expenses as may be necessary in taking such subscription, and the remainder shall be paid to the treasurer of the corporation as soon as the same shall be organized and the officers chosen as hereinafter mentioned.[4]

(4) Sec. 1, Act March 11, 1857, P. L. 77.

876. Issue of Charter—Organization—Powers of Corporation.

When twenty persons or more shall have subscribed twenty per centum of the capital stock provided for by the special act of assembly, the said commissioners or a majority of them may, or when the whole number of shares authorized as aforesaid shall be subscribed they shall certify under their hands and seals the names of the subscribers and the number of the shares subscribed by each to the Governor of this Commonwealth, whereupon it shall and may be lawful for the Governor, by letters patent under his hand and seal of State, to create and erect the subscribers, and if the subscriptions be not full at the time, then those who shall afterwards subscribe to the number aforesaid, into one body politic and corporate in deed and in law, by the name, style and title designated by such special act, and by such name the said subscribers shall have perpetual succession, and all privileges and franchises incident to a corporation, and shall be capable of taking and holding the capital stock, and the increase and profits thereof, and of enlarging the same by new subscriptions, in such manner and form, as they shall think proper, if such enlargement shall be found necessary to fulfill the intent of such special act, and of purchasing, taking and holding to them and their successors and assigns and of selling, transferring and conveying in fee simple or for any less estate, all such lands, tenements and hereditaments and estate, real and personal, as shall be necessary to them in the prosecution of their works, and of suing and being sued and of doing all and every other matter and thing which a corporation or body politic may lawfully do.[5]

The commissioners, aforesaid, as soon as convenient may be after the said letters patent shall be sealed and obtained, shall give notice in the manner provided for in the first section of this act, of the time and place by them appointed, at which time and place the said subscribers shall proceed to organize such corporation, and shall choose by a majority of the votes of the subscribers by ballot, delivered in person or by proxy, duly authorized, one president, five managers and one treasurer and such other officers as may be necessary to conduct the business of said company, until the first Monday of May next ensuing, and until their successors shall be chosen, and shall then or at any other regular meeting make such by-laws, orders and regulations, not inconsistent

(5) Sec. 2, Act March 11, 1857, P. L., 77.

with the Constitution and laws of the United States and of this Commonwealth, as shall be necessary for the proper management of the affairs of such company:[6]

877. Stockholders to Cast One Vote for Each Share of Stock Held by Them.

Provided, always, That on and after the passage of this act it shall be lawful for each stockholder of the capital stock of any gas or water company, made subject to the provisions of the act to which this is a supplement, to cast one vote for each share of stock so held by any such stockholder at any and all elections held by any of said companies.[7]

878. Stockholders Not Entitled to Vote Unless All Their Shares Are Fully Paid.

And provided also, That no stockholder, whether the original subscriber or assignee shall be entitled to vote at any election or meeting of said company, unless the whole sum due and payable on the share or shares by him or her held at the time of such election, shall have been fully paid and discharged.[8]

879. Elections—Judges of Elections.

No person acting as judge or officer for holding an election for officers or managers of any gas or water company incorporated as aforesaid, shall enter on the duties of his office or appointment until he take and subscribe an oath or affirmation before a judge, alderman or justice of the peace, that he will discharge the duties of his office or appointment with fidelity, that he will not receive any vote but such as he verily believe to be legal; and if any such judge or officer shall knowingly and wilfully violate his oath or affirmation, he shall be subject to all the penalties imposed by law upon the officers of the general elections of this Commonwealth violating their duties and shall be proceeded against in like manner and with like effect; and if any election for officers or managers as aforesaid be held, without the person holding the same having first taken an oath or affirmation as aforesaid, or be invalid for any other reason, such election shall be set aside in the

(6) Sec. 3, Act March 11, 1857, P. L., 77.

(7) Proviso to Sec. 3, Act March 11, 1857, P. L., 77, as amended by Act of May 15, 1874, P. L., 188.

(8) Sec. 3, Act March 11, 1857, P. L., 77.

manner now provided by law, and a new election ordered by the Court of Common Pleas of the proper county, upon the petition of not less than five stockholders supported by proof satisfactory to said court.[9]

880. Annual Meeting of Stockholders.

The stockholders of such company shall meet on the first Monday of May, in every year, at such place as shall be fixed by their by-laws, for the purpose of choosing officers as aforesaid to serve for the ensuing year or until their successors shall be duly chosen, and at such other times as they shall be summoned by the managers, in such manner and form as shall be prescribed by their by-laws; at which annual or special meeting they shall have full power and authority to make, alter or repeal, by a majority of votes, all such by-laws, rules, orders and regulations made as aforesaid, and to do and perform all lawful and necessary corporate acts: *Provided,* That no by-laws shall be altered or repealed without due notice thereof given at least one month previous thereto at a general or special meeting.[10]

881. Vacancies in Offices or Board of Managers.

In case of the death, removal or resignation of either the president or any of the managers, treasurer or other officers of any such company, the remaining managers may supply the vacancy thus created until the next election. And it shall be lawful for the board of managers to require the treasurer, or any other officer of any such company, to give bond with one or more sureties, for such an amount as they may deem necessary, conditioned for the faithful performance of the duties of the office to which he may have been elected or appointed.[11]

882. Stock Certificates—Transfers of Stock.

The president and managers of such company shall procure certificates or evidences of stock, and shall deliver them, signed by the president, countersigned by the treasurer and sealed with the common seal of the corporation, to each person or party entitled to receive the same according to the number of shares by

(9) Sec. 4, Act March 11, 1857, P. L., 77.
(10) Sec. 5, Act March 11, 1857, P. L., 77.
(11) Sec. 6, Act March 11, 1857, P. L., 77.

him, her or them respectively held; which certificates or evidences of stock, shall be transferable at the pleasure of the holder, in person or by attorney duly authorized, in presence of the president or treasurer, subject, however, to all payments due or to become due thereon. And the assignee or party to whom the same shall have been so transferred, shall be a member of said corporation, and have and enjoy all the immunities, privileges and franchises, and be subject to all the liabilities, conditions and penalties incident thereto, in the same manner as the original subscriber or holder would have been: *Provided,* That no certificate shall be transferred so long as the holder thereof is indebted to said company unless the board of managers shall consent thereto.[12]

883. Penalty for Failure to Pay Calls on Subscriptions.

If the stockholders, whether an original subscriber or assignee after twenty days' notice of the time and place appointed for the payment of any instalment or proportion of the capital stock, shall neglect to pay the same at the place appointed for the space of thirty days after the time appointed for payment thereof, such stockholder shall, in addition to the instalment so called for, pay at the rate of one per centum per month for every delay of such payment, and if the same and additional penalty shall become equal to the sum before paid on account of such share, the same may be forfeited by and to the said company, and may be sold by them at public sale for such price as may be obtained therefor, or in default of payment of any stockholders of such instalments as aforesaid for the space of sixty days after the time appointed as aforesaid, the president and managers may at their election cause suit to be brought in the same manner as debts of a like amount are now recoverable, for the recovery of the same, together with the penalties aforesaid.[13]

884. Power to Supply Gas.

Where any such company shall be incorporated as a gas company (it) shall have authority to supply with gas light the borough, town, city or district where it may be located and such persons, partnerships and corporations residing therein or adja-

(12) Sec. 7, Act March 11, 1857, P. L., 77.
(13) Sec. 8, Act March 11, 1857, P. L., 77.

cent thereto as may desire the same, at such price as may be agreed upon; and also to make, erect, and maintain therein the necessary buildings, machinery and apparatus for manufacturing gas from coal or other material, and distributing the same, with the right to enter upon any public street, lane, alley or highway, for the purpose of laying down pipes, altering, inspecting and repairing the same, doing as little damage to said streets, lanes, alleys and highways, and impairing the free use thereof as little as possible, and subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades, or for the protection and convenience of public travel over the same.[14]

885. Power to Supply Water.

Where such company shall be incorporated for the supply of water they shall have power to provide, erect and maintain all works and machinery necessary or proper for raising and introducing into the town, borough, city or district, where they may be located, a sufficient supply of pure water, and for that purpose may provide, erect and maintain all proper buildings, cisterns, reservoirs, pipes and conduits for the reception and conveyance of water; and they are authorized and empowered by themselves, their agents, engineers and workmen and with their tools, carts, wagons and beasts of draught or burden, to enter upon such lands and enclosures, streets, lanes, and alleys, roads, highways and bridges, as may be necessary to occupy and to obtain materials for the construction of said works, and to occupy, ditch, and lay pipes through the same, and the same from time to time to repair, subject to such regulations in regard to streets, roads, lanes and other highways, as is provided in the foregoing section for gas companies. And if any injury be done to private property, the said company shall make compensation therefor in the matter hereinafter provided.[15]

886. Power of Eminent Domain.

In case the owner or owners of lands and tenements through and upon which such pipes, trunks, aqueducts, reservoirs and cisterns are laid and constructed, or the owner or owners of lands

(14) Sec. 9, Act March 11, 1857, P. L., 77.
(15) Sec. 10, Act March 11, 1857, P. L., 77.

upon which it may be found necessary to enter for the purpose of digging, taking and carrying away clay, gravel and other materials necessary for the purposes contemplated by this act, or the owner or owners of any spring or springs, stream or streams of water, which may be used and appropriated by the company, or any person who may be injured by the diversion of the waters used by said company, cannot agree with the said company upon the damages or compensation to be paid to the said owner or owners, person or persons, it shall and may be lawful for the parties to appoint or in case the parties cannot agree, then, on application by the party complaining, the Court of Common Pleas of the county in which said company is located shall appoint three disinterested and suitable persons to ascertain and report, on oath or affirmation, to said court, what damages, if any, have or will be done by said company; which report having been returned and confirmed by said court, judgment shall be entered thereon, and execution may issue, in case of non-payment, for the sum awarded, with reasonable costs, to be assessed by the court: *Provided,* That either party may appeal from such award to the court within twenty days after the same shall have been filed in the office of the prothonotary of said county, in the same manner as appeals are allowed in other cases, whether the said report was made by persons agreed upon by the parties or appointed by the court, upon which appeal such proceedings shall be had as in other cases of damages: *Provided,* That nothing herein contained shall authorize said company to enter upon the land or appropriate the property of any individual, unless the parties agree, without first giving adequate security for any damage they may occasion, to be approved of by one of the judges of the Court of Common Pleas of the county: *Provided, further,* That this act shall not apply to any action for damages now pending in any court of this Commonwealth.[16]

887. Power to Borrow Money and Mortgage Property.

Any of the said companies shall have the power and authority, if they shall deem it necessary for the purpose of their incorporation, to borrow any sum or sums of money, in their corporate capacity, not exceeding in the aggregate one-half of their capital

(16) Act of April 24, 1869, P. L., 93, amending Sec. 11, of the Act of March 11, 1857, P. L., 77.

stock paid in at the time of obtaining said loan, and to secure payment of the same may make and execute a mortgage or mortgages, pledge or pledges of the property and effects of their said corporation, and give such other evidences of indebtedness as may be agreed upon; and the managers shall provide for the payment of the interest upon any loan made under this section, out of the receipts for gas or water, as the case may be, before any dividends shall be paid to the stockholders: *Provided,* That no certificate of loan, or other evidence of indebtedness as aforesaid shall be for a less sum than one hundred dollars.[17]

888. Power to Borrow Money and Mortgage Property Extended to Gas, Bridge and Water Companies Specially Incorporated Prior to 1857.

The provisions of the twelfth section of the act to which this is a supplement shall be and are hereby extended to all gas, bridge and water companies incorporated under any special law of this Commonwealth prior to the passage of the said act.[18]

889. Stock Certificates to Issue to the Amount of Cost of New Buildings and Material Improvements.

The president and managers or board of directors of any of said companies shall be empowered and they are hereby authorized, whenever they have created or shall erect and construct any new buildings, or any new and material improvements, such as are authorized by their respective charters, to issue certificates of stock to the amount of the cost of such buildings or improvements.[19]

890. Dividends to Be Declared Semi-Annually.

The board of managers of said company shall declare dividends, payable semi-annually, of so much of the net profits of the company as shall appear to them advisable.[20]

891. Penalty for Tapping Mains or Pipes.

If any person or persons shall open a communication into the water or gas main or other pipe of said company, without au-

(17) Sec. 12, Act March 11, 1857, P. L., 77.
(18) Sec. 1, Act March 28, 1871, P. L., 291.
(19) Sec. 2, Act March 28, 1871, P. L., 291.
(20) Sec. 13, Act March 11, 1857, P. L., 291.

thority from the inspector or other authorized agent of said company, or shall let on the water or gas after either shall have been stopped by order of said inspector or authorized agent of said company, for repairs or any other cause or purpose, or shall put up any hydrants, pipes or burners, in addition to those originally put up and inspected and introduce into them water or gas, as the case may be, without authority as aforesaid, he, she or they shall be subject to a penalty of not less than ten, nor more than one hundred dollars, recoverable before any alderman or justice of the peace of the proper county as debts of like amount are by law recoverable, one-half to be paid to the informer and one-half to the company.[21]

892. Penalty for Malicious Injury to Property of Corporation.

If any person shall willfully or maliciously do or cause to be done, any act or acts whatever whereby any building, construction, reservoir or works of said company, or any water or gas pipe, gas post, burner or reflector, or any matter or thing, appertaining to the same shall be stopped or obstructed, injured, contaminated or destroyed, the person or persons so offending shall be considered guilty of a misdemeanor, and may therefor be indicted in the Court of Quarter Sessions of the proper county, and on conviction thereof shall be punished by fine not exceeding five hundred dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court: *Provided,* That such criminal prosecutions shall not in any way impair the right of said company to a full compensation in damages by civil suit.[22]

893. After Twenty Years Municipalities May Purchase Plants.

It shall and may be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district into which the said company shall be located, to become the owners of said works and the property of said company, by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per cent. per annum.[23]

(21) Sec. 14, Act March 11, 1857, P. L., 77.
(22) Sec. 15, Act March 11, 1857, P. L., 77.
(23) Sec. 16, Act March 11, 1857, P. L., 77.

894. Charters Subject to Power of Legislature to Alter, Etc.

Every charter of incorporation which shall be granted under the provisions of this act, shall be subject to the power of the Legislature to alter, revoke, or annul the same whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators.[24]

895. Corporations to Elect a President and Five Managers, Who Shall Appoint Other Officers, Including the Treasurer.

Hereafter the stockholders of any company incorporated under the provisions of said act, shall choose by a majority of votes a president and five managers, each stockholder shall be entitled to one vote for each share of stock held by him, and the said president and managers shall appoint all other officers and agents necessary to conduct the business of such company.[25]

So much of the third and fifth sections of the Act of March eleventh, Anno Domini one thousand eight hundred and fifty-seven, as provides that the treasurer of such gas and water companies shall be elected by the stockholders and all other acts or parts of acts inconsistent herewith be and the same are hereby repealed.[26]

ARTIFICIAL GAS COMPANIES INCORPORATED UNDER THE PROVISIONS OF THE ACT OF APRIL 29, 1874.

896. Incorporation Authorized.

Corporations may be formed under the provisions of this act . . . . for . . . . XI. The manufacture and supply of gas. . . . .[27]

897. Statement of Purpose in Charter.

As stated in Sec. 874, the Secretary of the Commonwealth originally held that, in order for an artificial gas company to acquire an exclusive franchise, it should be incorporated for the supply of gas for light only, and that where a corporation was formed

(24) Sec. 17, Act March 11, 1857, P. L., 77.
(25) Sec. 1, Act May 18, 1878, P. L., 75.
(26) Sec. 2, Act May 18, 1878, P. L., 75.
(27) Sec. 1, Act of April 29, 1874, P. L., 73, and Sec. 2, Act of May 8, 1889, P. L., 136, amending Sec. 2, Act of April 29, 1874, P. L., 74.

for the manufacture and supply of gas for light, heat and fuel, it acquired no exclusive franchise even as to the furnishing of gas for light only.

While this ruling was in force it was customary for incorporators desiring to furnish gas for all three purposes and acquire an exclusive franchise as to the first, to take out one charter for the supply of gas for light only and another charter for the supply of gas for heat and fuel, and then merge the two companies.

As hereinbefore stated, the Secretary of the Commonwealth now holds, that one charter may be granted covering the three purposes, and an exclusive franchise acquired as to the furnishing of gas for light only. This question, however, has never been judicially passed upon, and it may be questioned whether, out of an abundance of caution, the better practice is not to take out two charters and then merge the corporations, as above mentioned.

Statement of purpose for the manufacture and supply of gas for light only:

The manufacture and supply of gas for light only to the public in [description of territory, which must not exceed a single county] and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same.

Statement of purpose for the manufacture and supply of gas for heat and fuel:

The manufacture and supply of gas for heat and fuel to the public in [description of territory, which must not exceed a single county] and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same.

Statement of purpose for the supply of gas for light, heat and fuel:

The manufacture and supply of gas for light, heat and fuel to the public in [description of territory, not to exceed a single county] and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same.

The statement of purpose must include the "manufacture" of gas.[28]

(28) See Emerson et al. *v.* Com., 108 Pa., 111 (1884); City Gas Light Co. of Phila., 18 Pa. C. C., 136 (1896).

898. Applications for Charters Must Designate the Territory Within Which the Franchises of the Companies Are to Be Exercised.

It was originally provided by Sec. 34 of the Act of April 29, 1874, that the operations of artificial gas companies should be confined to a single municipality. The Act of June 2, 1887, P. L., 310, however, amending said section, provides that the territory to be named in the articles of association of an artificial gas company "shall never cover more than a single county."

Under the said Act of 1887, therefore, the only limitation as to territory that need be set forth in articles of association of gas companies, is that such territory shall not cover more than a single county, and may not include any municipal division of a county that has already been covered by an exclusive charter. The Act of 1887 must be read as an independent statute.[29]

An application for a charter of a gas company must specifically set forth the territory in which the franchises of the company are to be exercised, and must not name territory embraced in two counties leaving the company to elect in which one of two separate districts it will operate.[30]

While the charter of a gas company was pending in the State Department, there might have been force in the objection that its charter did not specify the district or territory wherein it proposed to supply gas, but after the charter has issued, whether the precise boundaries of the district are named in it or not, the company has an exclusive franchise in the district fixed by its actual and legal operations, so that a charter will not be granted for such territory to another company.[31]

899. Powers of Artificial Gas Companies.

Companies incorporated under the provisions of this statute for . . . . the manufacture and supply of light, heat and fuel, or any of them by any process of manufacture, shall, unless otherwise provided by this act, from the date of the letters patent creating the same, have the powers and be managed, governed and controlled as hereinafter provided.[32]

(29) Heat, Light & Fuel Companies, 17 Pa. C. C., 113, (1895).

(30) In re Charter New Gas Light Co., Op. Sec. Com., 1 Dau. Co. Rep., 22 (1898); 7 D. R., 151.

(31) In re Charter Gas Company of Lancaster, 5 D. R., 244 (1896).

(32) Sec. 1, Act June 2, 1887, P. L., 310, amending the first paragraph of Sec. 34, of the Act of April 29, 1874, P. L., 93.

Where any such company shall be incorporated for the supply of heat, light and fuel, or any of them, by any process of manufacture, it shall have authority to supply such heat, light and fuel, or any of them, to the territory named in its articles of association (which shall never cover more than a single county), and to such persons, partnerships and corporations residing therein, or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and shall have the power of eminent domain to appropriate property, so far as may be necessary, to enable it to acquire that which is necessary for its plant (whether the same be in the county named in its articles of association, or elsewhere), and for its lines of distribution; and the power also to make, erect and maintain the necessary building, machinery, and apparatus for producing heat, light and fuel, or any of them, and to distribute the same; with the right to enter upon any public street, lane, alley, or highway, for such purpose, to alter, inspect and repair its system of distribution, doing as little damage to said streets, lanes, alleys and highways, and impairing the free use thereof as little as practicable, and subject to such regulations as the councils of any borough or city, whose highways may be occupied, shall adopt in regard to grades, or for the protection and convenience of public travel over the same: *Provided,* That no company which may now or hereafter be incorporated under the provisions of this act, shall enter upon any street in any city or borough of this Commonwealth, until after the consent to such entry of the councils of the city or borough in which such street may be located, shall have been obtained. And the said right of eminent domain shall be exercised in the mode prescribed and according to the provisions of the forty-first section of this act, with this proviso, however, that where any such company shall use its system of distribution for the conveyance of gas for any of the purposes aforesaid at a greater pressure than four ounces per square inch of pressure, or where the gas manufactured shall contain more than ten per cent. of carbonic oxide, such system of distribution shall be provided with suitable appliances for preventing, or taking up any leakage, so that danger to life, property and vegetation may be avoided.[33]

(33) Sec. 2, Act June 2, 1887, P. L., 310, amending Clause 1, Sec. 34, of the Act of April 29, 1874, P. L., 93.

900. Franchises for the Manufacture of Gas for Light Only, to Be Exclusive.

The right to have and enjoy the franchises and privileges of such corporation for the manufacture of gas, for light only, shall be an exclusive one, within the district or locality covered by its charter; and no other company shall be incorporated for the manufacture of gas to supply light only to the public until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock: *Provided,* That said corporation shall at all times furnish pure gas and water, and any citizen using the same may make complaint of impurity or deficiency in quantity or both, to the Court of Common Pleas of the proper county, by bill filed, and after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints, or compel the corporation to correct the evil complained of: *And provided,* That the right to have and enjoy the franchises and privileges of such corporation for the manufacture of gas for light only, shall not be an exclusive one in any case of a corporation existing prior to the twenty-ninth day of April, one thousand eight hundred and seventy-four, which has accepted or hereafter may accept the provisions of the Act of April twenty-ninth, one thousand eight hundred and seventy-four, entitled "An act to provide for the incorporation and regulation of certain corporations," or of said act and its supplements.[34]

Corporations of the character provided for herein shall be entitled to have a capital stock, not exceeding five million dollars.[35]

901. Revocation of Exclusive Rights Gained by the Acceptance, by Gas Companies Formed Prior to the Date of its Passage, of the Provisions of the Act of April 29, 1874, and its Supplements.

Whereas, the true policy of the grant of exclusive rights to gas companies is the encouragement and establishment of such

(34) Act of June 24, 1895, P. L., 267, amending the Act of June 2, 1887, P. L., 310, which act was amendatory of Clause 3, Sec. 34, Act April 29, 1874, P. L., 94.

(35) Sec. 4, Act June 2, 1887, P. L., 313. This provision is superseded by Sec. 2, of the Act of May 3, 1899, P. L., 190, which permits any corporation to increase its capital stock to any necessary amount. See Sec. 243.

companies for the supply of gas where no such supply was previously furnished, and the real consideration for such exclusive rights is the new public service thus secured.

And whereas, Many corporations long and profitably established have accepted the provisions of the said act of one thousand eight hundred and seventy-four, for the purpose of securing a monopoly of a business, the conditions of which invited competition, and of forestalling the incorporation of companies about to be organized.

And whereas, It is injurious to the citizens of the Commonwealth that the exclusive rights and privileges of gas companies which have accepted the provisions of said act of one thousand eight hundred and seventy-four, should longer continue.

Now therefore, in recognition of the limitation of article one, section seventeen and pursuant to the provisions of article sixteen, section ten of the Constitution:

All exclusive rights, franchises and privileges of each and every gas company which was in existence prior to April twenty-ninth, one thousand eight hundred and seventy-four, and which has since accepted the provisions of the act entitled "An act for the incorporation and regulation of certain corporations," passed the twenty-ninth day of April, one thousand eight hundred and seventy-four, or of the said act and its supplements, pursuant to the provisions of the twenty-sixth section of said act, as originally enacted, or as since amended, so far as said exclusive rights, franchises and privileges are conferred by the provisions of said act, or of any amendment thereof, or supplement thereto, are hereby revoked and annulled, anything in the twenty-fifth section or in any other provisions of said act or of any amendment thereof or supplement thereto, to the contrary notwithstanding.[36]

902. Prohibition and Punishment of Interference with Property of Gas Companies.

Whoever, except the authorized agent or employe for the purpose of the owner, manufacturer or operator thereof, maliciously opens, closes, or in any manner or to any extent adjusts or interferes with any valve, regulator, gauge, gate, disc, curbcock, stopcock, meter or other regulating, operating or measuring device or appliance in or attached to the wells, tanks, conduits,

(36) Act of June 24, 1895, P. L., 266.

pipe lines, mains, service pipes, house pipes, display pipes or other distributing pipes of any gas company, manufacturer or furnisher of gas, with intent to cause the escape of any gas or to injure or destroy any of such property, or maliciously enlarges or alters any mixer, furnished or approved by any gas company, manufacturer or furnisher of gas, to or for a customer of its, his or their gas, or maliciously removes from its connection any mixer so furnished or approved of, or puts on any mixer without express permission first obtained, or consumes for fuel or light the gas of any gas company, manufacturer or furnisher of gas, or taps, severs or opens any main or pipe used or intended for the transmission of gas, or connects with such main or pipe any other main or pipe, shall be deemed guilty of a misdemeanor and upon conviction thereof be sentenced to pay a fine not exceeding three hundred dollars, or undergo an imprisonment not exceeding three months, or both, or either, at the discretion of the court. The word "gas" in this act shall include and mean natural and artificial gas used for heating and illuminating purposes.[37]

903. After Twenty Years Municipal Corporations May Purchase Works—Courts of Common Pleas to Determine Reasonableness of Charges for Gas.

It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city or district into which the said company shall be located, to become the owners of said works, and the property of said company, by paying therefor, the net cost of erecting and maintaining the same, with interest thereon, at the rate of ten per cent. per annum, deducting from said interest all dividends theretofore declared: *Provided,* That nothing in this section contained shall authorize a company incorporated under the provisions of this act to construct gas or water works within the limits of any municipality, when gas or water works shall have been constructed by said municipality, without the lawful consent of the corporate authorities thereof: *And provided further,* That the Court of Common Pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said com-

(37) Act of June 26, 1895, P. L., 319. See Chapter on Water Companies for further provisions as to interfering with or trespassing on property of gas companies.

panies to hear, inquire and determine as to the charges thereof for gas or water so furnished, and to decree that the said bill be dismissed or that the charges shall be decreased as to the said court may seem just and equitable and to enforce obedience to their decrees by the usual process.[38]

904. Purchase of Property and Franchises of Water, Gas and Electric Light Companies by Cities of the Third Class.

The councils of any city of the third class are hereby authorized and empowered to purchase, for such price as may be agreed upon by the councils of the city and a majority of the stockholders of the company, all the real, personal and mixed estate of any water, gas or electric light company or companies in such city, or adjacent thereto and thereupon the said city shall possess and exercise all the rights, powers, privileges and franchises by law belonging or pertaining to such company or companies and may take and appropriate any stream or streams of water, spring or springs, lands, tenements, hereditaments, property and materials, near or accessible to such city, which may be necessary for the erection and maintenance of water, gas or electric light works, and for the supplying of said city with water or light, and may enter into and upon any lands, inclosures, streets or highways to procure materials for the construction of said works, doing as little damage as possible to property, and making compensation to the owner or owners of all species of property taken, appropriated or injured by them for the purposes aforesaid, as herein provided; but the powers granted by this section shall not be exercised by councils until authority so to do shall have been given them by a majority of the voters of such city, at a special election held for that purpose, of which election the mayor shall give notice as provided for municipal elections.[39]

905. Exclusive Privileges.

As pointed out in preceding sections, since the passage of the Act of June 2, 1887, only the franchise of supplying gas for light only is an exclusive franchise. Corporations incorporated under the Act of 1874, prior to the passage of the Act of 1887, have,

(38) Sec. 34, Clause 7, Act of April 29, 1874, P. L., 95.
(39) Art. 12, Sec. 1, Act May 23, 1889, P. L., 308.

however, an exclusive franchise of supplying gas for all purposes within their charter territory.

After the passage of the Act of April 29, 1874, many gas companies incorporated under special acts which did not confer any exclusive franchise, accepted the provisions of the Constitution and the said Act of 1874, for the purpose of obtaining an exclusive privilege to supply gas within the districts covered by their charters, respectively. Whether they thus gained an exclusive franchise or not was for a long time undecided.[40] It was finally held, however, that companies accepting the provisions of the Act of 1874 acquired exclusive privileges.[41]

To prevent this practice on the part of corporations formed prior to the passage of the Act of 1874, of accepting the provisions of that act, in order to obtain exclusive franchises, and to divest such franchises already acquired in that manner, the two Acts of June 24, 1895, Numbers 179 and 180, were passed, P. L., 266-68. See Secs. 900 and 901.

The former repealed the exclusive franchises acquired by reason of the acceptance of the Constitution, and the Act of April 29, 1874, by gas companies formed prior to the passage of the Act of 1874, and the latter amended the Act of 1874, so as to prevent any such corporation from acquiring an exclusive franchise in the future by the acceptance of said act.[42]

Where a gas company was incorporated prior to the passage of Act of June 2, 1887, restricting exclusive franchises to companies formed to furnish gas for light only, for the purpose of the manufacture and supply of gas or the supply of light or heat to the public by any other means, but such company had, in fact, never supplied gas for any other purpose than light, a charter was refused to a corporation to cover the same territory for the purpose of the manufacture and supply of gas to the public.[43]

A gas company for the supply of gas for light only was improvidently incorporated without designating in its application for charter the district or territory where it proposed to supply

(40) Pittsburg Illg. Gas Co. Op. Sec. Com., 16 Pa. C. C., 433 (1895); Suburban Gas Co. *v.* Darby Gas Co., 3 D. R., 491 (1894).

(41) Com. ex rel. *v.* Pittsburg Illg. Co., 180 Pa., 578 (1897).

(42) Williamsport Gas Co. *v.* Gas Co. of Williamsport, Op. Sec. Com., 17 Pa. C. C., 456 (1896); 5 D. R., 251.

(43) Lansdowne Gas Co. *v.* Swarthmore Light Co., 3 D. R., 492 (1894).

gas. Such company protested against the incorporation of a similar company to supply gas in the territory in which the first named company was actually supplying gas. Held, that such company had an exclusive franchise as to such territory and the application of the proposed company was refused.[44]

When the exclusive right to manufacture gas for light only within a designated district has been granted to one corporation, the chartering of another corporation for the same purpose within the same district though coupled with the power to furnish gas for heat is within the prohibition of the third section of the Act of June 2, 1887.[45]

A gas company for the supply of gas for light only incorporated under the Act of April 29, 1874, has, as against all subsequently incorporated gas companies, an exclusive privilege until it has earned and distributed for five years a dividend of eight per centum on its capital stock, although there has been in existence prior to its incorporation an incorporated company authorized to supply gas in the same territory.[46]

Where the charter of a gas company specifies a county within which it may exercise its franchise, such charter is not wholly void because of the existence of a city within the county where the company may not operate because another previously incorporated company has exclusive rights there.[47]

A charter for the manufacture and supply of gas generally is not in conflict with a prior franchise for the manufacture and supply of gas "for light only," but such a charter would confer no authority to supply gas for light.[48]

The exclusive franchises which a gas company possesses by reason of its original act of incorporation cannot be annulled by an amendment to another act which, in itself, has no connection either with the corporate existence of the company, or the franchises which it claims to possess. In other words, the Act of 1895,

(44) Gas Co. of Lancaster's Application, 5 D. R., 244 (1896).

(45) Incorporation of Gas Works Co. of Phila., etc., 1 Dau. Co. Rep., 55 (1897); Dauphin Lt. & Ht. Co., 1 Pa. C. C., 480 (1886).

(46) Com. *v.* Consumers' Gas Co. of Scranton, 214 Pa., 72 (1906).

(47) Com. *v.* Consumers' Gas Co. of Scranton, 214 Pa., 72 (1906).

(48) Incorporation of Gas Works Co. of Phila., etc., 1 Dau. Co. Rep., 55 (1897); Dauphin Lt. & Ht. Co., 1 Pa. C. C., 480 (1886); Op. Dep. Atty. Gen.

No. 179, was intended to repeal exclusive franchises obtained by companies incorporated prior to 1874, through the acceptance of the Act of 1874. The Act of 1895, No. 180, could, therefore, have no other effect than to so amend the existing corporation law as to provide for the enforcement of the Act, No. 179, with regard to future applications for charters of gas companies. Act No. 180 will not, therefore, oust a company from an exclusive franchise granted to it by a special charter, and not through the acceptance of the Act of 1874. Nor does the Act of 1895, No. 180, revoke a franchise granted not by acceptance of the provisions of the Act of 1874, but by an original charter under that act.[49]

A gas company incorporated prior to 1874, accepted in February, 1895, the provisions of the Act of April 29, 1874. On May 8, 1895, another gas company was incorporated to supply gas to the locality described in the charter of the first company. Quo warranto proceedings were brought against the second company, and the parties stipulated that decision should be upon the merits "whether the defendant is entitled to exercise the franchise of furnishing gas for light only . . . . this question to depend upon whether prior exclusive franchises vested in the first company." Held, (a) that the words "prior exclusive franchises" must refer, in point of time, to May 8, 1895, the date of the incorporation of the second company; (b) that the stipulation of the parties was not broad enough to raise the question of the constitutionality of the Act of June 24, 1895, P. L., 266, inasmuch as the question of "prior exclusive franchises," as it stood on May 8, 1895, could not be affected by any act not passed until June 24, having no retroactive words, even if such words could affect the case.[50]

A company formed under the special Act of February 27, 1856, had an exclusive privilege to furnish a certain territory with gas light. It accepted the provisions of the Act of April 29, 1874. Another company applied for a charter to supply heat by the means of manufactured gas in the same territory. The first company protested. Held, that the said first company could not enlarge its purpose by accepting the Act of 1874; that "supplying gas light" and "supplying heat by means of gas" are not identical

(49) Southside Gas Co. *v.* Southern Illg. Co., Op. Sec. Com., 18 Pa. C. C., 529 (1896).

(50) Com. *v.* Pitts. Illuminating Co., 180 Pa., 578 (1897).

purposes, nor does one in any way grow out of the other. The charter was granted.[51]

A corporation by special act was given the exclusive authority to supply a certain territory with gas light. After its incorporation certain persons applied for a charter to produce natural gas, and to deal in, transport, etc., the same, within the same territory. Held, that the Governor could neither refuse a charter to the latter company, nor require an express article in the articles of association, limiting the powers of the company, so that it could not supply gas for lighting purposes.[52]

906. Where Previously Incorporated Companies Have Forfeited Their Franchisee.

Under the provisions of the Act of May 16, 1889, P. L., 242, Sec. 2, and June 13, 1883, P. L., 123, Sec. 5,[53] corporations of the second class formed under the Act of April 29, 1874, forfeit their rights and privileges if they do not begin to carry on their work and construct necessary buildings within the space of two years from the date of their letters patent. Hence the existence of a charter to manufacture and supply gas for light only within a given territory, under which operations have not been begun as required by said act within two years from the date of the same, will not prevent the issuing of another charter for the same territory after the expiration of said period of two years unless the period of construction has been extended as provided in the said Act of 1889.

A question which has arisen, but has never been judicially decided is, what amount of work is it necessary for a gas company to do, the charter of which covers an entire county. In other words, can such a company, by beginning operations in one municipality within a county within two years from the date of its charter, indefinitely prevent the granting of charters for companies to operate in municipalities within said county wherein it has not begun operations? The better opinion seems to be that in order to preserve the exclusive franchise throughout the county, such company should commence operations within two years in each municipality within the county, and that if it does not do so, char-

(51) Keystone Fuel Gas Co., Op. Sec. Com., 12 Pa. C. C., 302 (1892).
(52) Citizens' Nat. Gas Co., Op. Atty. Gen., 9 Pa. C. C., 290 (1890).

ters may issue at the expiration of said period to such companies to operate in such municipalities as it has not begun operations in.

907. Municipal Consent.

Clause 1, of Sec. 34 of the Act of April 29, 1874, provided that gas companies might enter upon any such street, lane, etc., for the purpose of laying down pipes, etc., "subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades, or for the protection and convenience of public travel over the same." Under this provision the consent of municipalities to the operation therein of artificial gas companies was not necessary, their control of such corporations being limited to regulations in regard to grades, and for the protection and convenience of public travel.

Sec. 2 of the Act of June 2, 1887, supra, amending the said clause, however, adds the following provision:

"*Provided,* That no company which may now or hereafter be incorporated under the provisions of this act, shall enter upon any street in any city or borough of this Commonwealth until after the consent to such entry of the councils of the city or borough in which such streets may be located, shall have been obtained."

Consent of the authorities of townships of the first class is required by the following act:

No water company, gas company or electric light company shall enter upon or occupy, in any manner whatever, any street or highway within any township of the first class of this Commonwealth, without first making application, in writing, to the proper authorities of such township of the first class and obtaining its consent or permission, which shall be given by ordinance only, and upon such conditions, stipulations and regulations as the municipal authorities may deem proper.[54]

908. Municipal Impositions and Regulations.

A borough may by ordinance provide that streets may not be opened without the obtaining of a permit, and the fee for such permits may be based on the size of the openings contemplated, and in fixing the amount of such fee the cost to the borough of constructing the portion of the street excavated, after the same has been filled up, may be considered.[55]

(53) Sec. 95.
(54) Act of June 6, 1907, P. L., 417.
(55) Pottsville Borough *v.* Pottsville Gas Co., 32 Pa. C. C., 7 (1905).

An ordinance of a municipality, prohibiting the opening of streets for the purpose of laying gas mains, from December first to the following March, is a reasonable regulation, and binds a private corporation chartered before the passage of the ordinance and required to furnish gas and lay mains, etc., along the streets within the chartered limits on application from owners of property, whenever the profit would pay the expense. But an ordinance prohibiting such company from opening a paved street for the purpose of laying pipes from the main to the opposite side of the street is unreasonable and void.[56]

A borough may, under the police power, provide by ordinance for the payment of a reasonable annual license tax or fee to be paid by gas companies to defray the expense of police supervision and inspection, by borough officers and servants, of the pipes of such companies, and the burden of proof is on such companies to show that the fee is unreasonable.[57]

A natural gas company, organized under the provisions of the Act of May 29, 1885, for the purpose of "producing, dealing in, transporting, storing and supplying natural gas to consumers," etc., which has supplied a borough and its inhabitants with natural gas for illuminating purposes, is not prevented from so doing by the organization of an artificial gas company, under the Acts of April 29, 1874, and June 2, 1887, though the latter company may have, under said Act of 1887, an exclusive privilege to manufacture gas for light only.[58]

Where a city changes the grade of a street in order to do away with a railroad crossing and a gas and water company is obliged to move its pipes from the street because of the change of grade, the company cannot recover damages from the city,[59] and, under the police power, a city may, when it finds it necessary in the interest of the public health, remove a gas pipe from one part of a street to another, and in such case the company owning the same has no status to object to such removal or to demand damages or compensation on account thereof.[59*]

(56) Northern Liberties *v.* Northern Liberties Gas Co., 12 Pa., 318 (1849).

(57) Kittanning Borough *v.* Kittanning Consol. Nat. Gas Co., 26 Pa. Super. Ct., 355 (1904).

(58) Hagan *v.* Fayette Gas Fuel Co., 21 Pa. C. C., 503 (1898).

(59) Scranton Gas & Water Co. *v.* Scranton City, 214 Pa., 586 (1906).

(59*) Pittsburgh *v.* Consol. Gas Co. of Pittsburg, 34 Pa. Super. Ct., 374 (1907).

909. Liability for Consequential Damages.

In an action against a gas company for a nuisance the court defined a nuisance as "wantonly, unnecessarily and oppressively causing such smells as to annoy the plaintiff below in a special or peculiar degree beyond others in the immediate vicinity." Held, that the definition was not perfect, but that, when taken in connection with the further instruction to the jury, "that a certain degree of offensive odor is unavoidably incident to the business and must be endured by the public," it was as favorable to the defendant as a more perfect one would have been.[60]

Whether, since the Constitution of 1874, a gas company may not be liable for damages resulting from the lawful operation of its works on its property, as traction companies have been held to be,[61] has not been decided.

910. Gas Companies May Be Reorganized Under the Act of May 25, 1878.

Gas companies may be reorganized, after judicial sale, under the provisions of the Act of May 25, 1878, P. L., 145, being "manufacturing companies," within the meaning of that act.[62]

911. Gas Companies May Deal in Appliances for the Use of Gas.

Gas companies may incidentally deal in such patented appliances and conveniences as will induce new customers to use gas or old ones to use more. Such dealing is not *ultra vires*.[63]

They may also impose a penalty of three per centum on all bills remaining unpaid five days after presentation.[64]

912. Leasing of Municipal Gas Plants.

Where gas plants are constructed and operated by municipalities, this is done by them as business corporations, and not in their municipal capacities. Hence they may discontinue the supply of gas to the public or lease their plants to private corporations to operate the same. The Act of June 1, 1885, P. L., 37, relating to cities of the first class, does not limit this power.[65]

(60) Pottstown Gas Co. *v.* Murphy, 39 Pa., 257 (1861).
(61) See Secs. 457, 458.
(62) Gas & Water Co. of Downingtown *v.* Downingtown Boro., 193 Pa., 255 (1899).
(63) Malone *v.* Lancaster Gas, Light & Fuel Co., 182 Pa., 309 (1897).
(64) Bower et al. *v.* U. G. I. Co., 15 D. R., 251, 409 (1906).
(65) Baily *v.* Phila., 184 Pa., 594 (1898).

CHAPTER XXXVI.

ASSOCIATIONS FOR THE PREVENTION OF CRUELTY TO CHILDREN AND AGED PERSONS.

913. Formation of.
914. Appointment of Policemen for.
915. Revocation of Powers of Policemen.

913. Formation of.

In addition to the corporations not for profit of the first class authorized to be created by the second section, of "the corporation act of one thousand eight hundred and seventy-four," there may be formed, under the provisions of said act and the several supplements thereto, associations for the prevention of cruelty to children and aged persons, and said associations shall have the power to receive and hold such real and personal estate, as may be necessary for their purposes: *Provided,* That the clear yearly value or income of the real estate so held shall not exceed an amount equal to twenty thousand dollars.[1]

914. Appointment of Policemen for.

Any corporation so formed, as provided in the first section of this act, shall have the power to apply to the Governor of the Commonwealth to commission such persons, as the said corporation may designate, to act as policemen for said corporation.[2]

The Governor, upon such application, may appoint such persons, or either of them, as he may deem proper, to be such policemen, and shall issue a commission to such persons to act as such policemen.[3]

Every policeman so appointed shall, before entering upon the duty of his office, take and subscribe the oath required by the seventh article of the Constitution before the recorder of the

(1) Sec. 1, Act May 25, 1887, P. L., 265.
(2) Sec. 2, Act May 25, 1887, P. L., 265.
(3) Sec. 3, Act May 25, 1887, P. L., 265.

county in which said corporation is located, which oath, after being duly recorded by said recorder, shall be filed in the office of the Secretary of the Commonwealth; and such policemen, so appointed, shall severally possess and exercise all the powers of a policeman, in any county in which they may be directed by said corporation to act, and the keepers of jails, lock-ups, station-houses, in any of said counties, are required to receive all persons arrested by such policemen for the commission of any offense for the cruelty of children and aged persons, and to be dealt with according to law.[4]

It shall be the duty of the Secretary of the Commonwealth to issue a certificate showing the appointment of any such persons as policemen, as aforesaid, which certificate shall be evidence of the authority of said person to act as policeman, as aforesaid, in any of the counties of this Commonwealth.[5]

The compensation of such police shall be paid by the corporation for which the policeman are respectively appointed, as may be agreed upon between them.[6]

915. Revocation of Powers of Policemen.

When any corporation shall no longer require the service of any policeman, so appointed as aforesaid, it may file a notice to that effect, under its common corporate seal, attested by its secretary, in the office of the Secretary of the Commonwealth, and thereupon the power of such policeman shall cease and be determined.[7]

(4) Sec. 4, Act May 25, 1887, P. L., 265.
(5) Sec. 5, Act May 25, 1887, P. L., 265.
(6) Sec. 6, Act May 25, 1887, P. L., 265.
(7) Sec. 7, Act May 25, 1887, P. L., 265.

CHAPTER XXXVII.

ASSOCIATIONS OF EMPLOYES.

916. Associations of Employes May be Formed.
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916. Associations of Employes May Be Formed.

Whereas, Associations of capital are incorporated and protected by the laws of this Commonwealth;

And whereas, Associations of labor should have the same privileges; therefore,

From and after the passage of this act five or more employes, at least three of whom shall be citizens of the United States, may, by their agreement and upon a compliance with the provisions of this act, form themselves into an association for their mutual aid and benefit and protection in their trade concerns.[1]

917. Petition for Incorporation.

When such an association is to include employes residing in only one county of this Commonwealth, a petition in the following form or substantially so, may be presented to the Court of Common Pleas of such county:

To the honorable the Court of Common Pleas of ———— county;

The petition of the undersigned respectfully shows:

First. That they are employes and residents of the county of ————.

Second. That three of your petitioners are citizens of the United States.

Third. That they have agreed to form themselves into an asso-

(1) Sec. 1, Act May 13, 1889, P. L., 194.

ciation for their mutual aid, benefit and protection, in their trade concerns.

Fourth. That the name of said association is to be ————.

Fifth. That said association is to include only employes who are residents of said county.

Sixth. The chief office of said association is to be located at ————, said county.

Your petitioners therefore pray your honorable court to grant them a charter for such association.

And they will ever pray.

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Signatures of Petitioners.

State of Pennsylvania, } ss.
County of ———— }

Before me ————, in and for said county, personally appeared ————, the foregoing petitioners, who being duly ————, depose and say that the facts set forth in the foregoing petition are true.

———— and subscribed to, this ————
day of ————, Anno Domini ————.

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Signatures of Affiants.[2]

918. Petition Where Incorporators Reside in Two or More Counties.

When such association is to include employes residing in more than one county of this Commonwealth, an application for a charter for the same may be made to the Governor in the same, or substantially the same, form as to a court, excepting a change in the address thereof and an averment that the association is to in-

(2) Sec. 2, Act of May 13, 1889, P. L., 194.

clude employes residing in more than one county of this Commonwealth.[3]

919. Duty of Governor or Court on Presentation of Petition.

Upon the presentation of a petition or application as aforesaid, it shall be the duty of the court or of the Governor, to mark the same "granted," and file the same of record in the proper office, and on request a certified copy thereof, on the payment of a reasonable fee therefor, shall be given to the petitioners.[4]

920. Powers.

An association authorized by this act, by virtue of its charter, shall have the following powers:

First. To have succession by its associated name for the period limited by its charter, and when no period is limited thereby or by this act, perpetually, subject to the power of the General Assembly under the Constitution of this Commonwealth.

Second. To maintain and defend judicial proceedings.

Third. To make and use a common seal and alter the same at pleasure.

Fourth. To purchase, hold and transfer, such real estate and personal property as the purposes of the corporation may require.

Fifth. To elect or appoint and compensate such officers or agents as the business of the association may require.

Sixth. To establish a constitution and adopt by-laws and rules, not inconsistent with law, for the management of its property and the conduct and regulation of its affairs.

Seventh. To enter into any obligation necessary to the transaction of its business.

Eighth. To organize and establish, for the purposes mentioned in section one of this act, such subordinate associations of employes as shall apply therefor, under such reasonable rules, regulations and restrictions, as may by the parent association be deemed necessary.[5]

(3) Sec. 3, Act May 13, 1889, P. L., 194.
(4) Sec. 4, Act May 13, 1889, P. L., 194.
(5) Sec. 5, Act May 13, 1889, P. L., 194.

921. Embezzlement by Officers.

Any officer, agent or member of such association, or of any such subordinate association, who shall fraudulently take, keep or convert to his own use, or the use of another, any money or other thing of value, given to, collected for, or due, or belonging to such association, or which is to be sent, paid or delivered by such officer, agent or member, to any person, firm or corporation, on behalf of such association, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to restore the property, unless already restored, and to be imprisoned in the county jail or work house for any period not exceeding one year, or to pay a fine of not more than five hundred dollars, or both or either, at the discretion of the court.[6]

922. Penalty for Officers Refusing to Surrender Offices to Successors.

Any officer, agent or member of such association, or of any such subordinate association, who shall wilfully keep, secrete, mutilate or destroy, or refuse to turn over to his successor, duly elected or appointed, or to the proper authority as provided by the constitution and by-laws thereof, any seal, minute-book, record, ledger, voucher or other book or books, paper or papers or any article of personal property belonging or pertaining to the affairs of such association, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be sentenced to restore to the proper authority such article or articles and to undergo an imprisonment for a period not exceeding six months, or to be fined in any sum not exceeding three hundred dollars, or both or either, at the discretion of the court.[7]

(6) Sec. 6, Act May 13, 1889, P. L., 194.
(7) Sec. 7, Act May 13, 1889, P. L., 194.